

IN THE SUPREME COURT OF KANSAS

RECEIVED

APR -- 9 2015

HEATHER L. SMITH  
CLERK OF APPELLATE COURTS

STATE OF KANSAS *ex rel.* DEREK )  
SCHMIDT, ATTORNEY GENERAL, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
CITY OF WICHITA, KANSAS, )  
A Municipal Corporation, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Original Action No. \_\_\_\_\_

PETITION IN QUO WARRANTO

COMES NOW petitioner, the State of Kansas *ex rel.* Derek Schmidt, Attorney General, and respectfully brings this action in quo warranto seeking an order declaring the Wichita city ordinance that is the subject of this Petition null and void and permanently prohibiting the City of Wichita from publishing, implementing and enforcing the same for reasons identified in this Petition and the Memorandum in Support that accompanies this Petition.

In support of the Petition, petitioner alleges and states as follows:

**I. JURISDICTION AND PARTIES**

1. This is an original action in quo warranto pursuant to K.S.A. 60-1201 *et seq.* This Court has original jurisdiction by virtue of Article III, § 3, of the Kansas Constitution, K.S.A. 60-1201, *et seq.*, and Rule 9.01 of the Rules of the Kansas Supreme Court.

2. In accordance with Rule 9.01(a) of the Rules of the Supreme Court, petitioner is filing a memorandum in support of this Petition, together with documentary evidence supporting the facts alleged.

3. For reasons further described in the Memorandum in Support that accompanies this Petition, the Court should exercise its original jurisdiction over this matter because the case presents purely legal issues of significant public concern, because the relevant facts are established by the supporting documentary evidence, and also because there is a compelling need for an expeditious and authoritative ruling on the important legal issues presented. *See* Supreme Court Rule 9.01(b).

4. Derek Schmidt is the duly elected, qualified and acting Attorney General of Kansas. The Office of the Attorney General is created by Article I, § 1, of the Kansas Constitution. Statutory provisions relating to the powers and responsibilities of the Attorney General are found in K.S.A. 75-701, *et seq.*, and throughout the Kansas Statutes Annotated. The Attorney General has the authority to bring this action pursuant to K.S.A. 60-1203.

5. Respondent City of Wichita, Kansas, is a municipal corporation and a city of the first class, and is created and organized under the provisions of Article XII, § 5, of the Kansas Constitution. Statutory provisions relating to the powers and responsibilities of cities of the first class are found in K.S.A. 12-101 *et seq.*, K.S.A. 13-101 *et seq.*, and throughout the Kansas Statutes Annotated.

6. The City of Wichita may be served with process by serving Karen Sublett, City Clerk, at City Hall, 455 N. Main, 13<sup>th</sup> Floor, Wichita, Kansas 67202.

7. Petitioner has standing to assert this action pursuant to K.S.A. 60-1203, as well as the common law of the State of Kansas.

## **II. STATEMENT OF FACTS**

8. K.S.A. 12-3013 establishes a legislatively created initiative and referendum process by which citizens may submit a proposed ordinance to the governing body of a

municipality accompanied by a petition signed by a certain percentage (depending on the class of city) of the electors who voted in the last city election. If a petition is signed by the requisite number of qualified electors and the proposed ordinance is not otherwise unlawful, the governing body must either enact the proposed ordinance without alteration or submit the proposed ordinance to the voters, also without alteration. The ballot may, as here, contain a title generally descriptive of the contents of the proposed ordinance instead of the proposed ordinance itself. If an election is held and the majority of the electorate who cast ballots vote in favor of the proposed ordinance, the ordinance becomes valid and binding without alteration, and cannot be repealed or amended except by a vote of the electors at a subsequent election or by the governing body after passage of 10 years from the effective date.

9. On January 7, 2015, a group known as the Marijuana Reform Initiative filed an initiative petition with the Wichita City Clerk proposing an ordinance that would reduce the penalties for first time possession of marijuana and drug paraphernalia involving marijuana. (Exhibit F). A blank copy of the petition is attached to the Andaya Affidavit as Exhibit B.

10. The circulators of the petition drafted a proposed ordinance ("The Wichita Marijuana Ordinance") to accompany the petition. (Andaya Affidavit, ¶ 3). However, the proposed ordinance, attached to the Andaya Affidavit as Exhibit C, was not included in or attached to the petition filed with the City Clerk as required by K.S.A. 12-3013(a). (Andaya Affidavit, ¶¶ 4 and 6; Exhibits E and G).

11. On January 14, 2015, the Sedgwick County Election Office verified that the petition contained the necessary number of signatures of twenty-five percent (25%) of the qualified electors who voted in the last City election to require the City Council to consider the Wichita Marijuana Ordinance. (Andaya Affidavit, ¶ 6; Exhibit H).

12. On January 14, 2015, Kansas Attorney General Derek Schmidt received a request pursuant to K.S.A. 75-704 for an opinion concerning the Wichita Marijuana Ordinance, questioning whether its provisions were in conflict with existing state laws. (Andaya Affidavit, ¶ 2; Exhibit A). The requesters provided a copy of a blank petition and an apparent copy of the Wichita Marijuana Ordinance. (Andaya Affidavit, ¶ 2; Exhibits B and C). The exact language of the Wichita Marijuana Ordinance could not be officially confirmed because no ordinance was filed with the petition as required by K.S.A. 12-3013(a). (Exhibit J, page 2, Footnote 4). However, Deputy Attorney General Athena Andaya contacted the Interim Wichita City Attorney, who provided a copy of the proposed ordinance identical to that provided by the opinion requestors. (Andaya Affidavit, ¶ 3; Exhibit C). Deputy Attorney General Andaya also confirmed that the copy of the proposed ordinance was identical to the proposed ordinance on the website of the Marijuana Reform Initiative ([www.mri-ict.com](http://www.mri-ict.com)). (Andaya Affidavit, ¶ 3).

13. On January 27, 2015, the Wichita City Council met to discuss the Wichita Marijuana Ordinance. Interim City Attorney Sharon Dickgrafe advised the City Council that “any proposed ordinance establishing penalties for possession of marijuana less than those established by state law would be in conflict with state law,” and that “if the ordinance is found to conflict with state law, it would be void.” (Andaya Affidavit, ¶ 5; Exhibits F and G). Nevertheless, the Wichita City Council moved to approve Ordinance No. 49-936 submitting the Wichita Marijuana Ordinance to a vote of the citizens of the City of Wichita to be held on April 7, 2015. (Andaya Affidavit, ¶ 7; Exhibits F and I).

14. Ordinance 49-936 also sets forth the language of the ballot question, which reads as follows:

“SECTION 2. Ballot Question. The ballot question shall read as follows:  
Ballot Question:



SHALL THE FOLLOWING BE ADOPTED?

An ordinance reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of cannabis sativa l, otherwise known as marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00).

YES \_\_\_\_\_ NO \_\_\_\_\_”

(Exhibit I). The ballot question as approved in Ordinance 49-936 contains only a title generally descriptive of the contents of the proposed ordinance and not the actual language of the proposed ordinance. (Exhibit I).

15. On March 5, 2015, Attorney General Derek Schmidt issued Attorney General Opinion No. 2015-4, concluding that the proposed Wichita Marijuana Ordinance conflicted with uniform state law and would therefore be null and void if adopted. (Andaya Affidavit, ¶ 8; Exhibit J). Attorney General Schmidt sent a copy of the opinion to Interim City Attorney and Director of Law Sharon Dickgrafe, along with a letter requesting that the City take necessary steps to prevent the proposal from appearing on the ballot. (Andaya Affidavit, ¶ 9; Exhibit K). The City Council took no action in response to the letter.

16. On April 7, 2015, the participating voters of Wichita approved the proposed ordinance by an unofficial total vote of 20,075 (54%) voting yes and 17,091 (45%) voting no. The official canvass of the election results is scheduled for 10 a.m. on Monday, April 13, 2015. (Andaya Affidavit, ¶ 10).

**III. GROUNDS FOR RELIEF**

17. Quo warranto relief declaring the Wichita Marijuana Ordinance null and void and permanently prohibiting the City of Wichita from enforcing it should be granted for the following reasons, as more thoroughly described in the accompanying Memorandum in Support.

**A. The Wichita Marijuana Ordinance Is Preempted by Uniform State Law.**

18. Article XII, § 5, of the Kansas Constitution prohibits cities from adopting ordinances that conflict with uniform state law. Quo warranto is an appropriate means of challenging the validity of a municipal ordinance.

19. Prior to passage of the Wichita Marijuana Ordinance, Section 5.26.040 of the Code of the City of Wichita, Kansas provided that a conviction for possession of marijuana or of drug paraphernalia related to marijuana was a misdemeanor punishable by a fine not to exceed \$2,500 and/or imprisonment in the county jail for up to 12 months. These crimes and penalties were parallel to the crimes and penalties provided for in K.S.A. 2014 Supp. 21-5706 and 21-5709, which are uniform state statutes.

20. The Wichita Marijuana Ordinance amends Section 5.26.040 of the Code of the City of Wichita so that it now conflicts with uniform state law in numerous ways.

Marijuana Possession

21. K.S.A. 2014 Supp. 21-5706 is a uniform state criminal statute governing marijuana possession.

22. K.S.A. 2014 Supp. 21-5706(c)(2)(A) classifies the first conviction for possession of marijuana as a class A nonperson misdemeanor punishable by a fine not to exceed \$2,500 and/or imprisonment for up to 12 months. *See* K.S.A. 2014 Supp. 21-6611(b)(1) and K.S.A. 2014 Supp. 21-6602(a)(1).

23. Subsection (b) of the Wichita Marijuana Ordinance provides that certain marijuana possession offenses, although illegal, are reclassified as “infractions” punishable only by a fine not to exceed \$50.00. Subsection (b) also eliminates the possibility of jail time for these offenses. Classifying misdemeanors under K.S.A. 2014 Supp. 21-5706(c)(2)(A) as

“infractions” and reducing penalties below those provided by Kansas statute impermissibly conflicts with state law.

24. While K.S.A. 2014 Supp. 21-5706(c)(2)(A) provides that a first time marijuana possession offense is a class A misdemeanor, K.S.A. 2014 Supp. 21-5706(c)(2)(B) provides that subsequent marijuana possession convictions are drug severity level 5 felonies.

25. The Wichita Marijuana Ordinance further conflicts with state law by redefining the meaning of a first offense. Subsection (d) of the Wichita Marijuana Ordinance provides that “any conviction or convictions resulting from the same incident occurring after July 1, 2015, shall constitute a first offense and any subsequent conviction or convictions occurring within one (1) year thereafter shall constitute a subsequent offense.” (Exhibit C). Under this provision, an offender who has one or more marijuana convictions before July 1, 2015, will be treated as a first time offender for any new offense occurring after July 1, 2015, and the new offense is classified as an “infraction,” even though K.S.A. 2014 Supp. 21-5706(c)(2)(B) provides that a subsequent marijuana offense is a felony. State law contains no provision for disregarding prior convictions in this manner. Additionally, subsection (d) of the Wichita Marijuana Ordinance classifies all offenses occurring after July 1, 2015, as first offenses as long as each offense occurs at least one year apart. (Exhibit C). State law contains no such decay factor that allows disregarding prior convictions more than one year old. An offender with multiple marijuana offenses could avoid the heightened penalty for repeat offenders established by K.S.A. 2014 Supp. 21-5706 under the provisions of subsection (d) of the Wichita Marijuana Ordinance. Disregarding prior convictions in these ways impermissibly conflicts with state law.

26. Section (b) of the Wichita Marijuana Ordinance provides reduced penalties only to individuals 21 years of age or older who possess 32 or fewer grams of marijuana. (Exhibit C).

K.S.A. 2014 Supp. 21-5706 makes no exceptions or exclusions based on the age of the offender or the amount of marijuana possessed, and thus the Wichita Marijuana Ordinance establishes new elements, not contained in state law, that a Wichita city prosecutor must prove to obtain certain convictions. Adding additional elements that must be proven by the prosecution to establish the offense impermissibly conflicts with state law.

#### Drug Paraphernalia

27. K.S.A. 2014 Supp. 21-5709 is a uniform state criminal statute governing possession of drug paraphernalia.

28. Under K.S.A. 2014 Supp. 21-5709(b), possession of certain drug paraphernalia is a class A misdemeanor punishable by a fine not to exceed \$2,500 and/or up to one year in jail.

29. Subsection (c) of the Wichita Marijuana Ordinance conflicts with K.S.A. 2014 Supp. 21-5709(b) by making the first offense for possession of marijuana paraphernalia by a person 21 years of age or older an “infraction” punishable by a fine not to exceed \$50.00 and no possibility of jail time. For the same reasons that the changes to the marijuana possession ordinance impermissibly conflicts with state law, so do the changes to the drug paraphernalia ordinance.

#### Duties of Law Enforcement Officers

30. K.S.A. 22-2202 and K.S.A. 2014 Supp. 74-5602 are uniform state statutes imposing duties on all law enforcement officers in the State of Kansas.

31. Section (d) of the Wichita Marijuana Ordinance creates a “gag rule” for City of Wichita law enforcement officers by providing that “[n]o law enforcement officer of the City of Wichita, Kansas or his or her agent, shall complain of violations of [subsections (b) and (c) of the ordinance] to any other authority except the City Attorney of the City of Wichita, Kansas.”

(Exhibit C).

32. This conflicts with the legal duties of law enforcement officers to enforce state law, including the responsibility to present offenses they uncover to state authorities for prosecution when appropriate. Prohibiting Wichita police officers from carrying out their statutory duties impermissibly conflicts with state law.

#### Offense Recording and Reporting

33. K.S.A. 21-2501a and K.S.A. 2014 Supp. 12-4106 are uniform state statutes imposing duties on law enforcement agencies and municipal judges to report certain offense information to the Kansas Bureau of Investigation.

34. Section (d) of the Wichita Marijuana Ordinance provides that “[n]o convictions pursuant to Subsections (b) and/or (c) [of the ordinance] shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.” (Exhibit C).

35. This conflicts with K.S.A. 21-2501a, which provides that:

“(a) All law enforcement agencies having responsibility for law enforcement in any political subdivision of this state, on forms approved by the attorney general, shall maintain a permanent record of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions.

(b) All law enforcement agencies having the responsibility of maintaining a permanent record of offenses shall file with the Kansas bureau of investigation, on a form approved by the attorney general, a report on each offense for which a permanent record is required within 72 hours after such offense is reported or known to have been committed.”

36. This also conflicts with K.S.A. 2014 Supp. 12-4106(e), which requires municipal judges to ensure that “information concerning dispositions of city ordinance violations that result in convictions comparable to convictions for offenses under Kansas criminal statutes is

forwarded to the Kansas bureau of investigation central repository.”

37. Prohibiting the Wichita Police Department and Wichita municipal judges from complying with their statutory duties to report certain criminal justice information to state authorities impermissibly conflicts with state law.

38. For all these reasons, the Wichita Marijuana Ordinance conflicts with, undermines, and is preempted by uniform state law.

**B. The Wichita Marijuana Ordinance Was Not Adopted in Accordance with State Law.**

39. Even if the Wichita Marijuana Ordinance were not preempted by uniform state law, the requested quo warranto relief should be granted because the Ordinance was not properly adopted. It is procedurally deficient in at least three regards, each of which standing alone requires it be declared null and void.

40. K.S.A. 12-3013(a) requires that a proposed ordinance must be filed with the city clerk along with the initiative petition. The Wichita Marijuana Ordinance was not filed with the city clerk and therefore its adoption violated both the plain language of K.S.A. 12-3013 and due process principles. It should thus be declared null and void.

41. The Wichita Marijuana Ordinance does not contain an ordaining clause as required by K.S.A. 12-3005 and should therefore be declared null and void.

42. K.S.A. 12-3013(e) provides that administrative ordinances may not be adopted through the initiative and referendum process. The Wichita Marijuana Ordinance is primarily administrative in nature because it executes existing law, because it deals with a small segment of the overall drug policy question, because it addresses administrative operations of the Wichita Police Department and Municipal Court that require “specialized training and experience in municipal government,” and because it addresses an issue of statewide concern in which the

Legislature has delegated limited authority to municipal governments to serve as designated agent for local implementation of state policy but has not delegated authority to local electors to alter uniform state law. Accordingly, the Wichita Marijuana Ordinance was not the proper subject of an initiative petition under K.S.A. 12-3013. It should thus be declared null and void.

#### **IV. OTHER PENDING ACTIONS**

43. On April 8, 2015, Wichita Interim City Attorney Sharon Dickgrafe filed a Petition for Declaratory Judgment in Sedgwick County District Court, Case No. 15-CV-0910. (Andaya Affidavit, ¶ 11; Exhibit L). The City's Petition confirms the sequence of events leading to the passage of the Wichita Marijuana Ordinance, which are also described in this Petition in Quo Warranto.

44. Although the City has requested the district court to determine the validity of the Wichita Marijuana Ordinance, it does not appear that the City requested a temporary restraining order. As explained in the State's Motion for a Temporary Restraining Order and Memorandum in Support in this matter, a temporary restraining order is necessary to preserve the status quo because the Wichita Marijuana Ordinance becomes effective upon its approval by the voters, *see* K.S.A. 12-3013(c), arguably when the election results are certified by the county board of canvassers.

45. Determination of the validity of the Wichita Marijuana Ordinance is a matter of statewide importance and requires a final determination by the State's highest court.

46. Given the need for an expeditious and authoritative ruling from this Court, and the desirability of avoiding unnecessary and duplicative litigation, the State is filing a separate motion with this Petition requesting a stay of the district court proceedings in Sedgwick County District Court Case No. 15-CV-0910.


**V. RELIEF SOUGHT**

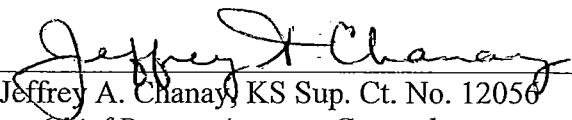
WHEREFORE, for the reasons stated herein and in the Memorandum in Support, Motion for Temporary Restraining Order, and Motion to Stay District Court proceedings filed herewith, petitioner seeks the following relief:

- a. Quo warranto relief declaring the Wichita Marijuana Ordinance null and void, and permanently prohibiting the City of Wichita from publishing, implementing and enforcing the same;
- b. A temporary restraining order preventing the City of Wichita from publishing, implementing or enforcing the Wichita Marijuana Ordinance during the pendency of this action;
- c. An order staying district court proceedings in *City of Wichita v. Bradley*, 15-CV-0910 (18<sup>th</sup> Judicial District, filed April 8, 2015); and.
- d. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL  
DEREK SCHMIDT

By:   
Derek Schmidt, KS Sup. Ct. No. 17781  
*Attorney General*

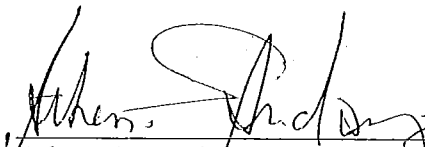
By:   
Jeffrey A. Chanay, KS Sup. Ct. No. 12056  
*Chief Deputy Attorney General*  
Lisa A. Mendoza, KS Sup. Ct. No. 12034  
*Assistant Attorney General*  
Dwight R. Carswell, KS Sup. Ct. No. 25111  
*Assistant Solicitor General*  
120 SW 10<sup>th</sup> Avenue, 2nd Floor  
Topeka, KS 66612-1597  
Tel: (785) 296-2215 / Fax: (785) 291-3767  
Email: [derek.schmidt@ag.ks.gov](mailto:derek.schmidt@ag.ks.gov)  
[jeff.chanay@ag.ks.gov](mailto:jeff.chanay@ag.ks.gov)  
[lisa.mendoza@ag.ks.gov](mailto:lisa.mendoza@ag.ks.gov)  
[dwight.carswell@ag.ks.gov](mailto:dwight.carswell@ag.ks.gov)



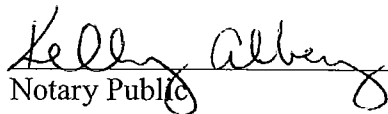
# VERIFICATION

STATE OF KANSAS       )  
                                  )  
COUNTY OF SHAWNEE   )       SS:

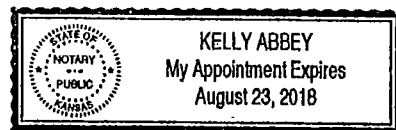
Athena E. Andaya, being first duly sworn on her oath, states that she is authorized to sign this verification on behalf of the State of Kansas in the above captioned matter and that she has read the foregoing Petition In Quo Warranto, and that same is true and correct according to her knowledge, information, and belief.

  
\_\_\_\_\_  
Athena E. Andaya  
Deputy Attorney General

SUBSCRIBED AND SWORN TO before me, a Notary Public in the state and county aforesaid, this 9<sup>th</sup> day of April, 2015.

  
\_\_\_\_\_  
Notary Public

My appointment expires: 08.23.2014.



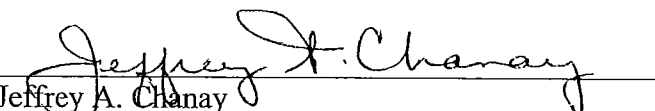
### CERTIFICATE OF SERVICE

This is to certify that on this 9<sup>th</sup> day of April, 2015, a copy of the above and foregoing Petition in Quo Warranto and accompanying affidavit with exhibits was served by faxing and mailing the same by depositing it in the United States Mail, first class postage prepaid, addressed to:

Karen Sublett  
Wichita City Clerk  
City Hall – 13<sup>th</sup> Floor  
455 N. Main  
Wichita, Kansas 67202  
Fax (316) 858-7776

Sharon L. Dickgrafe  
Interim City Attorney  
City Hall – 13<sup>th</sup> Floor  
455 North Main  
Wichita, Kansas 67202  
Fax (316) 268-4335

A copy will also be served by hand delivery to the above-identified individuals at the addresses listed on the 10<sup>th</sup> day of April, 2015.

  
Jeffrey A. Chanay

IN THE SUPREME COURT OF KANSAS

STATE OF KANSAS *ex rel.* DEREK )  
SCHMIDT, ATTORNEY GENERAL, )  
 )  
Petitioner, )  
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v. )  
 )  
CITY OF WICHITA, KANSAS, )  
A Municipal Corporation, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Original Action No. \_\_\_\_\_

AFFIDAVIT

STATE OF KANSAS )  
 )  
COUNTY OF SHAWNEE ) ss:

ATHENA E. ANDAYA, after being duly sworn upon her oath, states as follows:

1. I am a Deputy Attorney General for the Office of Kansas Attorney General Derek Schmidt. My job responsibilities include drafting Attorney General opinions pursuant to K.S.A. 75-704.

2. On January 14, 2015, Attorney General Schmidt received a request for an Attorney General opinion from Representative Mark Kahrs, House District 87, and Representative Steven R. Brunk, House District 85, regarding whether state law preempts a city ordinance that imposes a lower criminal penalty than the state law. Representative Brunk provided me with a copy of a two-page document entitled "Petition to the Governing Body of the City of Wichita, Kansas" from the Marijuana Reform Initiative – ICT, and a two-page letter

dated January 5, 2015, to Representative Brunk from Jason Long, Senior Assistant Revisor of Statutes. The opinion request is attached as Exhibit A. The first page of the Marijuana Reform Initiative document was a blank petition which is attached as Exhibit B. The second page was a proposed ordinance repealing the entirety of Section 5.26.040 of the Code of the City of Wichita and replacing it with substitute provisions. The proposed ordinance (“The Wichita Marijuana Ordinance”) is attached as Exhibit C. The letter from Senior Assistant Revisor Long is attached as Exhibit D.

3. While researching the question presented, I contacted Sharon Dickgrafe, Interim City Attorney for the City of Wichita, Kansas, to obtain a copy of the proposed ordinance language drafted by the Marijuana Reform Initiative. The copy of the proposed ordinance provided to me by Ms. Dickgrafe was identical to the copy provided to me by Representative Brunk and is attached as Exhibit C. I also visited the website of the Marijuana Reform Initiative ([www.mri-ict.com](http://www.mri-ict.com)) and confirmed that the proposed ordinance on their website was identical to the copies provided to me by Representative Brunk and Ms. Dickgrafe.

4. I asked Ms. Dickgrafe if the proposed ordinance was attached to the petition filed with the City Clerk. Ms. Dickgrafe stated in an email, attached as Exhibit E, that, “[t]he proposed ordinance language was not attached to any of the petitions filed with the City Clerk.”

5. Ms. Dickgrafe further provided me with an attachment containing the Minutes from the City Council meeting held on January 27, 2015, at which the City Council voted to place the Wichita Marijuana Ordinance on the ballot. The relevant portion of the Minutes discussing the Wichita Marijuana Ordinance is attached as Exhibit F.

6. The Minutes referenced several attachments that I located on the Wichita City Council’s website ([www.wichita.gov/Government/Council/Pages/default.aspx](http://www.wichita.gov/Government/Council/Pages/default.aspx)) under the

“Minutes and Streaming Videos” tab. One attachment was a memorandum dated January 27, 2015, from the City of Wichita Law Department that is attached as Exhibit G. In this memorandum, the Law Department acknowledges that “any proposed ordinance establishing penalties for possession of marijuana less than those established by state law would be in conflict with state law” and that an ordinance “found to conflict with state law . . . would be void.” The memorandum also states that “[t]he drafted revisions to code section 5.26.040 were not included in or attached to the petition filed with the City Clerk.” I also verified that on January 14, 2015, the Sedgwick County Election office certified that the petition presented to the City Council contained the necessary number of signatures of twenty-five percent (25%) of the qualified electors who voted in the last City election to require the City Council to consider the Wichita Marijuana Ordinance. The Certificate of the Commissioner of Elections is attached as Exhibit H.

7. The Minutes also contained an attachment labeled Ordinance No. 49-936 submitting the proposed Wichita Marijuana Ordinance to the voters at the April 7, 2015, city election. Ordinance No. 49-936 is attached as Exhibit I. The Minutes reflect that the City Council approved Ordinance No. 49-936 at their January 27, 2015, meeting.

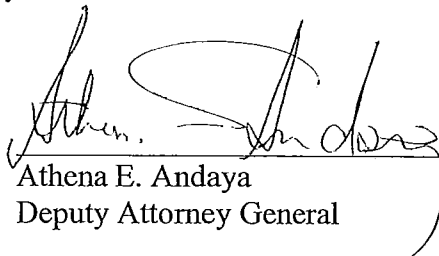
8. On March 5, 2015, Attorney General Derek Schmidt issued Attorney General Opinion No. 2015-4 concluding that the proposed Wichita Marijuana Ordinance conflicted with uniform state law and would therefore be null and void if adopted. Attorney General Opinion No. 2015-4 is attached as Exhibit J.

9. Also on March 5, 2015, Attorney General Schmidt sent a copy of Attorney General Opinion No. 2015-4 to Interim City Attorney and Director of Law Sharon Dickgrafe, along with a letter requesting that the City take necessary steps to prevent the proposal from appearing on the ballot. The Attorney General’s letter is attached as Exhibit K.

10. On April 9, 2015, I visited the website of the Sedgwick County Election Office. According to the unofficial election results posted on that website ([http://www.sedgwickcounty.org/elections/election\\_results/Gen15/index.html](http://www.sedgwickcounty.org/elections/election_results/Gen15/index.html)), the Wichita Marijuana Ordinance passed with 20,075 "yes" votes (54%) to 17,091 "no" votes (45%). The website states that the official canvass will begin on Monday April 13, 2015, at 10:00 a.m., in accordance with K.S.A. 2014 Supp. 25-3104.

11. On April 8, 2015, I received a copy of an email from Interim City Attorney Sharon Dickgrafe advising that the City of Wichita had just filed a Petition for Declaratory Judgment in the District Court of Sedgwick County, Case No. 15-CV-0910. The Petition for Declaratory Judgment is attached as Exhibit L.

**FURTHER AFFIANT SAITH NAUGHT.**

  
Athena E. Andaya  
Deputy Attorney General

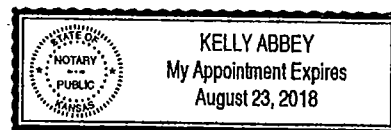
STATE OF KANSAS       )  
                                  )  
COUNTY OF SHAWNEE   )       ss:

**BE IT REMEMBERED**, that on this 9<sup>th</sup> day of April, 2015, before me, the undersigned, a Notary Public in and for the county and state aforesaid, came ATHENA E. ANDAYA, who is personally known to me as the same person who executed the within instrument of writing and such person duly acknowledged the execution of the same.

**SUBSCRIBED AND SWORN TO** before me, a Notary Public, in the state and county aforesaid, on this 9<sup>th</sup> day of April, 2015.

  
NOTARY PUBLIC

My Appointment Expires: 08.23.2018



STEVEN R. BRUNK  
REPRESENTATIVE, 85TH DISTRICT  
8119 CHAMPIONS CT.  
WICHITA, KANSAS 67226  
(316) 744-2409

STATE CAPITOL, ROOM 285-N  
TOPEKA, KANSAS 66612  
(785) 296-7645  
steve.brunk@house.ks.gov

STATE OF KANSAS  
HOUSE OF REPRESENTATIVES



TOPEKA

January 14, 2013

LG-15-000119  
OR 2015-3

COMMITTEE ASSIGNMENTS  
CHAIRMAN: FEDERAL & STATE AFFAIRS  
VICE CHAIR: JOINT COMMITTEE ON STATE  
BUILDING & CONSTRUCTION  
MEMBER: COMMERCE, LABOR & ECONOMIC  
DEVELOPMENT  
MEMBER: TAXATION

RECEIVED

JAN 14 2015

KANSAS ATTORNEY GENERAL

Attorney General Derek Schmidt  
2<sup>nd</sup> Floor, Memorial Hall  
120 SW 10<sup>th</sup> Avenue  
Topeka, KS 66612-1597

Dear Attorney General Schmidt:

We are writing to obtain your opinion concerning the Marijuana Reform Initiative – ICT petition (Petition) and its proposed amendments to Section 5.26.040 of the Municipal Code of the City of Wichita. Enclosed is a copy of the Petition with this letter. We are concerned as to whether the amendments proposed in the Petition are in conflict with existing state laws that criminalize the possession of marijuana. Additionally, if the amendments are approved at a duly called election on the question, then we are concerned as to what penalty would apply to the crime of possession of marijuana in the City of Wichita.

We understand that the Kansas Supreme Court has consistently held that a city cannot adopt a criminal ordinance that is in conflict with uniform state law. Since the state statute establishes a more severe penalty for possession of marijuana than that proposed in the Petition, it appears that the proposed amendments in the Petition would be in conflict with state law. Based on our understanding of court precedent, if there is a conflict then convictions under the proposed amendments would be a nullity and the individual could still be prosecuted under state law. Please advise as to whether this is a correct understanding of the law.

Your prompt response would be greatly appreciated.

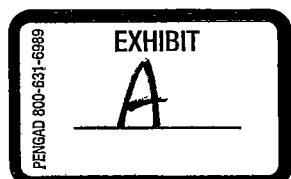
Sincerely,



Representative Mark Kahrs  
House of Representatives 87<sup>th</sup> District



Representative Steven R. Brunk  
House of Representatives 85<sup>th</sup> District



**MARIJUANA REFORM INITIATIVE – ICT**

Petition to the Governing Body of the City of Wichita, Kansas

Whereas the public interest of the City of Wichita, Kansas, is best served in reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years or age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00); and, the public interest of the City of Wichita, Kansas, is best served if persons subject to complaint of the aforementioned are provided with summons or notice to appear, without arrest, and that no subsequent conviction thereto shall be recorded as a misdemeanor;

Therefore Section 5.26.040 of the Municipal Code of the City of Wichita, Kansas, shall be repealed in its entirety and the substitute provisions set forth in MARIJUANA REFORM INITIATIVE - ICT, as available, shall be adopted by the City of Wichita, Kansas. To such extent that Charter Ordinance No. 122 must be further revised, repealed, amended or otherwise modified in order to implement said initiative, the City Council of the City of Wichita, Kansas, is requested to take such legislative action as may be necessary, reasonable or prudent. The City Council of the City of Wichita, Kansas, is further requested to take such other policy change or legislative action as may be necessary, reasonable or prudent to implement and codify the purpose and intent hereof.

I, the undersigned, a qualified elector of the City of Wichita, Kansas, request that the following proposed ordinance, without alteration, be passed or referred to a vote the electors pursuant to the provisions of Chapter 25-3601 of the Kansas Statutes:

**Shall the following be adopted?**

**AN ORDINANCE REDUCING THE PENALTY FOR FIRST OFFENSE CONVICTION FOR POSSESSION OF THIRTY-TWO (32) GRAMS OR LESS OF CANNABIS SATIVA L., OTHERWISE KNOWN AS MARIJUANA, AND/OR DRUG PARAPHERNALIA RELATED THERETO, BY PERSONS TWENTY-ONE (21) YEARS OR AGE OR OLDER, TO AN INFRACTION WITH A FINE NOT TO EXCEED FIFTY DOLLARS (\$50.00).**

I have personally signed this petition. I am a registered elector of the State of Kansas and of the City of Wichita, Kansas, and my residence address is correctly written after my name.

	DATE	SIGNATURE	PRINTED NAME	PRINTED ADDRESS	CITY
0	01/01/XX	<i>Jane B. Doe</i>	Jane B. Doe	123 S Main, Apt 0	Wichita
1					
2					
3					
4					
5					
6					
7					

State of Kansas }  
County of Sedgwick } ss:

I am the circulator of this petition and I am qualified to circulate this petition and I personally witnessed the signing of the petition by each person whose name appears thereon. I believe the statements made herein and that each signature appended to the paper is the genuine signature of the person whose name it purports to be.

Signature of Circulator

Circulator's Residence address

Signed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2014, by \_\_\_\_\_

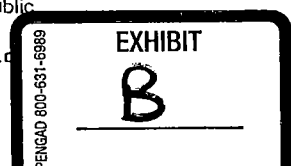
Circulator Print Name

Notary Public

My appointment expires:  
Seal

For more information, contact info@mri-ict.org

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OCT 15 2014





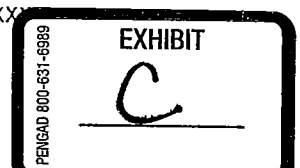
MARIJUANA REFORM INITIATIVE – ICT

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OCT 15 2014

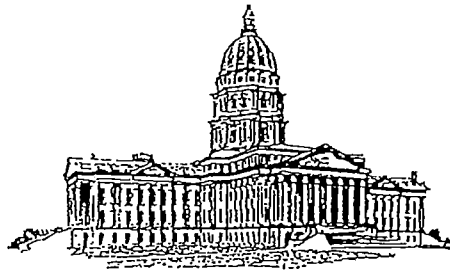
SECTION 5.26.040 OF THE MUNICIPAL CODE OF THE CITY OF WICHITA, KANSAS, SHALL BE REPEALED IN ITS ENTIRETY AND THE SUBSTITUTE PROVISIONS SET FORTH BELOW SHALL BE ADOPTED.

- (a) Except as provided at Subsections (b) and (c) herein, a violation of the provisions of this Chapter is a misdemeanor and, upon conviction, the sentence shall be a fine not to exceed two thousand five hundred dollars (\$2,500.00), and/or imprisonment of up to twelve (12) months in the Sedgwick County Jail.
- (b) A conviction of any person twenty-one (21) years of age or older of Section 5.26.010 for possession of ~~one~~<sup>368</sup> (32) grams or less of *cannabis sativa* L., or otherwise known as marijuana, as defined by Section 5.25.005(i), for the first offense, is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or rehabilitative measure, shall be imposed; however, pursuant Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant Section 1.06.010 *et seq.*
- (c) A conviction of any person twenty-one (21) years of age or older of Section 5.26.030 for possession of drug paraphernalia, as defined by Section 5.25.005(f), for the first offense, involving *cannabis sativa* L., or otherwise known as marijuana, as defined by Section 5.25.005(i), is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed; however, pursuant Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant Section 1.06.010 *et seq.*
- (d) The intent of Subsections (b) and (c) of this Chapter is to reduce first offense convictions pursuant Sections 5.26.010 and 5.26.030 for *cannabis sativa* L., or otherwise known as marijuana, as defined by Section 5.25.005(i), to be an infraction, and not a misdemeanor. For the purpose of determining whether a conviction is a first or subsequent offense under Subsections (b) and/or (c), any conviction or convictions resulting from the same incident occurring after July 1, 2015, shall constitute a first offense and any subsequent conviction or convictions occurring within one (1) year thereafter shall constitute a subsequent offense. Nothing herein shall be construed to restrict law enforcement officers of the City of Wichita, Kansas, to complain of violations of offenses other than Subsections (b) and (c) of this Chapter. No law enforcement officer of the City of Wichita, Kansas, or his or her agent, shall complain of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas; and, furthermore, the City Attorney of the City of Wichita, Kansas, or any of his or her authorized assistants, shall not refer any said complaint to any other authority for prosecution. No convictions pursuant Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.
- (e) Should the State of Kansas enact lesser penalties than that set forth in Subsections (b) and (c) of this Chapter for possession of *cannabis sativa* L., or otherwise known as marijuana, as described therein, or possession of drug paraphernalia, as further described therein, then these Subsections, or relevant portions thereof, shall be null and void. The invalidity or unenforceability of any provisions of Subsections (b) and (c) shall not affect the validity or enforceability of other provisions thereof, which shall remain in full force and effect.
- (f) In addition to any other sentence authorized by this Chapter, any person convicted of having violated the terms of this Chapter, while under twenty-one (21) years of age, shall be ordered to submit to and complete a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008 and amendments thereto and to pay a fee for such evaluation. If the judge finds that the person is indigent, the fee may be waived.

FOR MORE INFORMATION, CONTACT THE MARIJUANA REFORM INITIATIVE – ICT COMMITTEE AT (316) XXX-XXX



GORDON L. SELF, ATTORNEY  
REVISOR OF STATUTES  
JILL A. WOLTERS, ATTORNEY  
FIRST ASSISTANT REVISOR



Legislative Attorneys  
transforming Ideas Into legislation

OFFICE OF REVISOR OF STATUTES  
LEGISLATURE OF THE STATE OF KANSAS

January 5, 2015

Representative Steven R. Brunk  
8119 E. Champions Court  
Wichita, KS 67226

Re: Marijuana Reform Initiative - ICT

Dear Rep. Brunk,

At your request, I have reviewed the Marijuana Reform Initiative – ICT petition (Petition) and its proposed amendments to Section 5.26.040 of the Municipal Code of the City of Wichita. The primary issue with the proposed amendments is whether they are in conflict with existing state laws that criminalize the possession of marijuana. Upon further review of the relevant case law it appears that the proposed amendments would be in conflict with state law and that an individual could still be prosecuted pursuant to state law regardless of the penalty provided in the Wichita municipal code.

The Kansas Supreme Court (Court) has consistently held that a city cannot adopt a criminal ordinance that is conflict with uniform state law. In *State v. Jenkins*, 295 Kan. 431 (2012), the Court held that the municipal prosecution of the defendant for theft was void because the municipal code classified the theft as a misdemeanor in conflict with state law, which classified the same theft as a felony. The defendant's state felony conviction was upheld. Similarly, in *City of Junction City v. Cadoret*, 263 Kan. 164 (1997), the Court upheld the dismissal of a municipal DUI conviction because the municipal code did not classify the DUI offense as a felony and therefore, was in conflict with state criminal law.

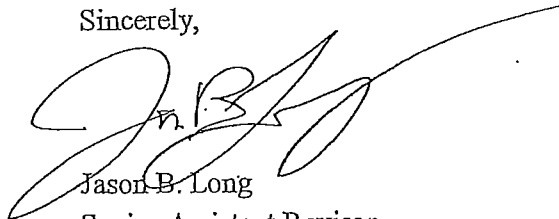
The proposed amendments would create a conflict similar to that described in the cases above. The proposed Section 5.26.040 would declassify the first offense of possessing 32 grams or less of marijuana from a misdemeanor to an infraction, while K.S.A. 2014 Supp. 21-5706

classifies such offenses as misdemeanors. In all likelihood, the proposed Section 5.26.040 would have the same legal effect as those municipal ordinances in the cases set out above; which is to say it would have no legal effect. Based on prior case law if the proposed amendments set out in the Petition were to become part of the Wichita municipal code, then the Wichita municipal court would no longer have jurisdiction over marijuana possession offenses because the local ordinance would be in conflict with state criminal law.

The general rule that has been expressed and applied numerous times by the Court is that “[c]ities can adopt an ordinance or resolution relating to a local police power, even though there is a state law on the subject uniformly applicable to all municipalities, *as long as the ordinance or resolution does not conflict with the state statute.*” *Jenkins*, at 441-42 (emphasis added). The proposed amendments appear to go beyond the parameters established by the general rule and in doing so would likely nullify the local ordinance.

Please contact me if you have any further questions with respect to this issue, or if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Long", with a long, sweeping horizontal line extending to the right.

Jason B. Long  
Senior Assistant Revisor

## Andaya, Athena

---

**From:** Dickgrafe, Sharon [SDickgrafe@wichita.gov]  
**Sent:** Friday, February 20, 2015 9:25 AM  
**To:** Andaya, Athena  
**Subject:** RE: Language of Proposed Marijuana Ordinance  
**Attachments:** 8 27 14 and 1 27 15 Agendas and Minutes re Marijuana.pdf

The proposed ordinance language was not attached to any of the petitions filed with the City Clerk.

I am attaching the minutes from the city council meeting on Aug. 12<sup>th</sup> regarding my direction to assist the petition group. I did meet with the group's attorney Scott Poor regarding several procedural issues created with the original language submitted in August establishing a "civil penalty". The final language and the proposed ballot question were drafted by the group's attorneys.

If you need any additional information, please let me know.

Thanks

Sharon L. Dickgrafe  
Chief Deputy City Attorney  
[sdickgrafe@wichita.gov](mailto:sdickgrafe@wichita.gov)  
(316) 268-4681, ext. 24

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**From:** Andaya, Athena [<mailto:Athena.Andaya@ag.ks.gov>]  
**Sent:** Friday, February 20, 2015 7:31 AM  
**To:** Dickgrafe, Sharon  
**Cc:** Andaya, Athena  
**Subject:** RE: Language of Proposed Marijuana Ordinance

Thank you, Ms. Dickgrafe. I very much appreciate receiving the language in the attachment.

Did your office assist the petition group with the drafting of the proposed ordinance language? Also, was the draft revision to code section 5.26.040 included in or attached to the petition filed with the City Clerk? Agenda Item No. IV-1 for the January 27, 2015 City Council Meeting states that it was not.

Thanks for your time and consideration.

Sincerely,



Athena E. Andaya, Deputy Attorney General  
Office of the Kansas Attorney General Derek Schmidt  
Legal Opinions and Government Counsel Division  
120 SW 10th Avenue, 2nd Floor  
Topeka, Kansas 66612-1597  
Phone: (785) 368-8401  
Fax: (785) 296-6296  
[Athena.Andaya@ag.ks.gov](mailto:Athena.Andaya@ag.ks.gov)  
[www.ag.ks.gov](http://www.ag.ks.gov)

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**From:** Dickgrafe, Sharon [<mailto:SDickgrafe@wichita.gov>]  
**Sent:** Friday, February 20, 2015 7:20 AM  
**To:** Andaya, Athena  
**Subject:** Language of Proposed Marijuana Ordinance

Ms. Andaya, per your request, attached is the proposed ordinance language submitted by the petition group. If the Attorney Generals' office needs any additional information, please let me know.

Thanks so much.

Sharon L. Dickgrafe  
Chief Deputy City Attorney  
[sdickgrafe@wichita.gov](mailto:sdickgrafe@wichita.gov)  
(316) 268-4681, ext. 24

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#### IV. NEW COUNCIL BUSINESS

1. Petition Calling for Election to Adopt Ordinance Reducing Criminal Penalties for Possession of Marijuana and Marijuana Paraphernalia.

Attachment: Agenda Report No. IV-1

Attachment: Notice of Special Election Re Marijuana

Attachment: Ordinance No. 49-936

Attachment: Ordinance No. 49-935

Attachment: Marijuana Petition

Attachment: Certificate

Sharon Dickgraft Interim Director of Law reviewed the item.

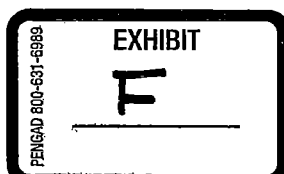
Mayor Brewer inquired whether anyone from the audience wished to be heard.

1) Rebecca Morris stated she is here in support of Kansas for Change and the marijuana reform initiative and would like to give the opposition an opportunity to present their arguments.

2) Benita Gooch 2918 E. Douglas stated she is with the Community Voice newspaper and Marijuana Reform Initiative ICT. Stated she is pleased that Wichitans have come together in this grassroots effort to address an issue that is important to them. Stated the City's attorney and their attorney worked to together and developed an excellent compromise in the wording for the petition. Stated for those who are listening, this is not legalizing marijuana or medical marijuana; this is marijuana penalty reform for adults and not for minors. Stated the petition addresses what the members of her coalition were most concerned about, which is excessive sentencing for any non-violent crimes. Stated minor infractions today are having major impacts on people's lives. Stated we are ruining the lives of our citizens, destroying families, and costing taxpayer's money. Stated marijuana is not the gateway to other drugs but is the gateway to the criminal justice system, and we have got to stop that. Stated this petition is a good start.

(Council Member Miller momentarily absent)

3) Allan Ternary 1461 North Burton Street stated he went out and gathered petitions on election day and found an overwhelming support for this petition and also found overwhelming support when he went out and approached people in the public. Stated he appreciates the City working with them on this and it is important to him to move this forward. Stated he has a long family history in farming and feels that the civil penalties and court problems is holding up the farmers that they cannot participate in this. Stated he spoke to the legislative forum earlier this month and his main message to them was that the Canadian and Chinese farmers are making \$250 to \$350 an acre profit producing hemp products. Stated this would be something that would



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provide a huge tax base for the state to address these issues such as the water pipe leak that is happening.

(Vice Mayor Blubaugh momentarily absent)

4) Janice Bradley 214 Buckridge Court stated the organization she works with began their work four years ago with the reading of Michelle Alexander's book, The New Jim Crow: Mass Incarceration in the Age of Colorblindness. Stated they learned that in the U.S. our rate of caging people is unprecedented in human history. Stated we are five percent of the world's population and we have 25% of the world's prisoners. Stated we have higher prisoners per capita than places like China, Iran, Russia, etc., which has ramifications for our community locally. Stated in January 2013 they developed a diverse coalition of groups and showed the film, The House I Live In, which detailed issues with the failed 40 year drug war, the resulting mass incarceration, private prisons, prosecutions, and mandatory minimums, which are all areas in the criminal justice system crying for reform. Stated later that year they hosted Jack Cole of Law Enforcement Against Prohibition, for numerous speaking venues who told his own story. Stated they began to research and learn about our local situation in the same context as his and looked for ways to make change. Stated our jail went over capacity and was then expanded and filled to capacity again. Stated the taxpayers were horrified, jails are expensive and the City/County leaders took measures to work through various departments and with various programs and reforms to keep the jail population down with some success. Stated it has not really reduced but remains under capacity. Stated these efforts to reduce jail population are stymied by the continual flood of small marijuana arrests and by actions by the Kansas lawmakers who have gone overboard with mandatory minimum sentences enacting 99 sentencing enhancements since 2006. Stated they looked to see what they could do locally to chip away a little piece of this drug war and investigated the laws and began the petition April 1, 2014. Stated they are not alone in their concerns, in the first week of January, Charles Koch editorialized with a piece called The Overcriminalization of America, which he writes against mass incarceration and steering millions without enhancing public safety, enforcing so many victimless crimes leading to conflict between citizens and police and that more than half of federal inmates are non-violent drug offenders. Stated this petition for a City ordinance on marijuana penalty reform has its origins in local work against mass incarceration and the drug war and the desire of citizens to bring about change. Stated at a time when our elected representatives may be resistant to sentencing reform for fears of repercussion; we the citizens have followed the rules to bring change through the ballot.

5) Doug Ballard 9200 Shade stated this topic is being discussed in many cities besides Wichita and shared examples of what Philadelphia and the state of Michigan are doing. Stated he would encourage the Council to take this matter seriously and will trust the judgment of the Council.

6) Esau Freeman 601 North Terrace stated today he is here to ask the Council to introduce this and accept it and be the forward thinking legislatures who take a stand for the citizens. Stated 6,500 people signed the first petition and more than 4,500 people signed the second petition. Stated this is something the people of Wichita are ready for. Stated while looking through today's agenda, he sees that 12 liquor licenses are on the agenda for approval and asked the Council how many people die from alcohol and lock every year for DUIs? Stated if this is

such a terrible scourge on our society; he would question these 12 liquor licenses. Stated he would appreciate it if the Council would have the political courage to introduce this themselves and stop allowing the public to sit back and ask why you will not deal with this. Stated after looking at all of the Council's campaign material; none of it said that you were here to serve the corporate interest of the corporation of the City of Wichita. Stated everything on your information says that you are all here to serve the people and to do the will of the people. Stated if you choose not to introduce this yourself, we should put it to the vote of the people because that is who you serve and that is who has the right to have an opinion on this.

7) Jennifer Winn 1465 Caddy Court stated mass incarceration is a serious issue, 2.4 million people are currently incarcerated in our country, 56% of those are for victimless crimes and this is a way to put a stop to that. Stated it is not the solution that most of Kansas wants but it is a beginning. Stated the Council is here to serve the will of the people, which is their job and what the public expects is for the Council to listen. Stated when you have 10,000 people that have signed a petition, they ask that the Council represent the people which they were elected to do and help them stop the mass incarceration that goes on in our country every day.

8) Billy Anderson 1227 Jefferson stated today we have heard some of the negative effects on the war on drugs, but they are not only restricted to the United States. Stated he recently returned from Honduras with a delegation from Witness for Peace and their focus was on the causes of migration. Stated Honduras has become the most violent country in the world per capita fueled in part by the war on drugs promoted by our government. Stated it has unintended consequences such as black markets, criminal gangs, violence, and political corruption, which are all inevitable products of prohibition and the significant reason for the migration of women and children trying to reach the U.S. Stated today Wichita has an opportunity to take a step in the correct direction away from criminalization and towards a more humane approach to a public health problem. Stated he urges the Council to take this small initial step to allow the voters of Wichita to decide this April.

9) Constance Abercrombie 1106 South Minneapolis stated we all have an opportunity to make a difference in Kansas to start the ball rolling in the right direction to eliminate petty victimless arrests and jail time. Stated this is an exciting time and encouraged the Council to pass this and if they cannot do that today, then to allow the citizens to vote.

(Council Member Meitzner momentarily absent)

10) Russell Fox 605 North Westlink Avenue stated he is a professor at Friends University. Stated he hopes that all of the Council recognize what a positive opportunity this is. Stated so much of what takes place in a complex society that attempts to govern itself through the oft times byzantine mechanisms of mass democracy. Stated it seems to end up in the hands of experts and bureaucracies and does not tend to intersect all that much with the direct action of citizens. Stated this is one of the things that does. Stated over the past years there has developed from many different ideological perspectives; a general consensus that the war on drugs and policies of mass incarceration and the way those practices boil down to simple decisions about the criminalization of marijuana are real genuine public threats. Stated they are public threats that can be addressed through real genuine civic action. Stated the fact that



thousands of people here in the City of Wichita have signed petitions, and have gone through the process to bring this before the Council, means that this City Council today has the ability to participate in a discussion that is not just city-wide, state-wide or nation-wide but is even broader than that. Stated the City of Wichita through the efforts of citizens that have collected these petitions and brought them before the City Council; it is already part of a wide and important conversation about genuine public concerns. Stated by enacting this petition or by putting it to a vote, this City Council can embrace that role positively and be that much more of a contributor to a conversation, which is not going to end.

11) Allan Ternary stated a lot of people are afraid to sign the petition because they are afraid it will make them a target from law enforcement.

(Council Member Longwell momentarily absent)

12) Robert Chavez stated he currently resides in Colorado but was a former citizen of Wichita. Stated he would ask that the Council approve the cannabis penalty reform that is before them today. Stated he is an advocate for medicinal cannabis as well as industrial hemp. Stated he has a disease, which is multiple sclerosis and is an advocate for patients like himself and asked the Council to consider this.

Council Member Clendenin stated the state of Kansas sets the statute for the penalties in the state of Kansas, which is what our laws are modeled after.

Sharon Dickgrafe Interim Director of Law stated yes we have the same penalty that the state statute has at this point, which is possession of marijuana is a Class A misdemeanor with a fine up to \$2,500 and up to one year in jail.

Council Member Clendenin stated we do get a legal opinion whether it is valid or not remains to be seen. Stated one of our state legislatures spoke to the attorney, the reviser of statutes at the state who said that as the City of Wichita cannot impose or lessen any law that is set in state statute, however, it is interesting that state law allows for the petition process. Stated he happens to be on the opposite opinion of most of the audience today. Stated in his family he has seen what the use of alcohol and mind altering drugs does to the family unit. Stated he has a different perspective than those who have spoken today. Stated his vote today would be to allow this to go on the ballot not because he is in favor of the use of marijuana.

Mayor Brewer stated there is an option for the Council to go into Executive Session with the City attorney.

Council Member Miller stated this is an issue that has been before the Council for several months and we have been counseled that we have two options which is to vote to put it on the ballot and the other is to vote to adopt it. Stated we have known during this entire time of discussion that this ordinance if adopted would be in conflict with state law and also know that if the ordinance by slim chance were to pass in April, that the state can file a court action and have it declared null and void. Stated at that time the City can make a decision to not adopt it if that were to happen and feels that is the cleanest action we can take today. Stated we have before us

a certified petition that has come to us through a petition process that is set out in state law that gives the people a right to petition its government to make changes in ordinances. Stated that is an important and basic democratic right and we have made sure to follow that process. Stated we have indicated to the citizens who are advocating for this and worked on it that we would work with them to craft language that would be enforceable if we were able to enforce it if the state allowed us to put it on the books and could change other ordinances accordingly. Stated at the Council's request she has worked with the group to craft that language but has been very clear all along with the group that we recognize that if this were to pass, the state is very likely to take a court action to nullify it. Stated although she does not know how a future Council would vote, she is pretty certain it would not vote to spend money litigating or taking to court supporting the ordinance and fighting state law. Stated she thinks the cleanest way is for them to vote to put it on a ballot that way they do not run the risk of being sued by the group and having to defend why we are not following state statute. Stated they have been advised by the City's attorney that courts do not usually issue advisory opinions.

Council Member Williams stated she echoes the words of Council Member Miller and appreciates the process that the group took in getting us to this point. Stated she wants our community to understand that they are not looking at legalizing marijuana but this is to decriminalize those who are found possessing smaller amounts. She will be asking that the City as a whole make this decision and not just seven people.

Mayor Brewer stated he has listened to the conversation and rationale that many have brought forward today. Stated what the Council finds most disturbing about this is how it does negatively impact people's lives and the way our laws are today, they are damaging.

Council Member Meitzner requested to go into Executive Session for consultation with legal.

#### RECESS - EXECUTIVE SESSION

Carl Brewer moved to recess to Executive Session to consider: consultation with legal counsel on matters privileged in the attorney-client relationship relating to: legal advice and that the Council return from Executive Session no earlier than 10:40 a.m. and reconvene in the City Council Chambers on the first floor of City Hall.

Motion carried 7 to 0

Reconvene

The City Council reconvened in the Council Chambers at 10:46 a.m.

Mayor Brewer announced no action was taken or needed as a result of the Executive Session.

Carl Brewer moved to close the Executive Session.

Motion carried 7 to 0

Council Member Miller stated she would like to convey especially to media who are going to be replaying sound bites of this and to all of those who are really concerned about this: Stated a

number of the Council have real divided internal conflicts within ourselves about what to do here. Stated we can read state statute and it tells us what the process is, which they followed. Stated the state statute is unclear about what to do if there is an ordinance that is petitioned that is in conflict with state statute. Stated there are a number of Council Members who want to be clear that they are not trying to be antagonistic toward the state and that it is a matter of respecting the state statutes that are in place, following that process, and letting the judicial process play out following the ballot initiative. Stated the state legislature may very well want to take up the issue of this state statute that sets out this petition process and maybe it will want to add language that says that municipalities are not required to adopt ordinances that would conflict with state law but at this time most of us who are going to vote for this feel like we have read the state statute, it says what to, which we are going to do, and then are going to let the process play out. Stated she does not think there is any intent or willingness on the part of this Council but to fight it if the state strikes it down it will simply not be adopted here and this group will have the prerogative to continue at the state level and the state will have had the opportunity to see how Wichita voters feel about this subject. Stated this is a very difficult situation for a number of Council Members because we all want to be good citizens, good policy makers, follow the democratic process, and do not want to be at odds with our state legislature.

Janet Miller moved to approve the ordinance calling for a special election and direct the clerk to publish the appropriate notices of election.

Motion carried 6 to 1 (Nay: Pete Meitzner).

Council Member Meitzner stated he would like to extend his appreciation for the respectfulness that has been shown today. Stated you had a lot of compelling comments and hopes that they will be shared with the state legislative branch

City of Wichita  
City Council Meeting  
January 27, 2015

**TO:** Mayor and City Council

**SUBJECT:** Petition Calling for Election to Adopt Ordinance Reducing Criminal Penalties for Possession of Marijuana and Marijuana Paraphernalia

**INITIATED BY:** Law Department / City Clerk

**AGENDA:** New Business

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**Recommendation:** Consider petition requesting passage of an ordinance reducing the penalties for possession of marijuana and marijuana paraphernalia to an infraction.

**Background:** K.S.A. 12-3013 establishes a procedure for citizens to submit a proposed ordinance to the governing body of a municipality for passage by a petition signed by twenty-five percent (25%) of the electors who voted in the last City election.

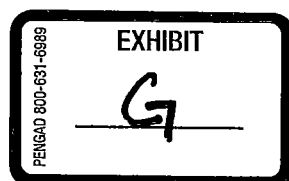
In August of 2014, the City Council considered a petition to enact a civil penalty for the possession of marijuana. The petition submitted failed to contain the required number of signatures for the City Council to place the issue on a ballot for a public vote.

At that time, legal staff was directed to work with the petition group to develop a petition which addressed a number of staff's legal concerns. After several meetings, petition language was finalized. Specific changes to existing City code, Section 5.26.040 were drafted. Throughout discussions with the group, City legal staff continued to advise them, that without a change in state law, the proposed ordinance would appear to conflict with state law.

On January 7, 2015, a petition was filed with the City Clerk proposing an ordinance which would reduce the penalties for first time possession of marijuana. The drafted revisions to code section 5.26.040 were not included in or attached to the petition filed with the City Clerk. On January 14, 2015, the Sedgwick County Election Office verified that the petitions contained the necessary signatures of twenty-five percent (25% of the qualified electors who voted in the last City election) to require the City Council to consider the proposed ordinance.

**Analysis:** State statutes require the City Council to take action on the proposed ordinances within 20 days of certification of the necessary number of signatures by the Election Commissioner. The deadline for submitting questions on the ballot has been established as February 9, 2015, by the Election Commissioner. The City Council has three options:

- Pass the proposed ordinance;
- Call for an election;
- File an action in Sedgwick County District Court for an opinion regarding the validity of the ordinance.



**Pass the proposed ordinance.**

Pursuant to K.S.A. 12-3013, the City may pass the ordinance as written. The proposed ordinance reduces the penalty for a first offense conviction of 32 grams or less of Cannabis Sativa or drug paraphernalia related to marijuana, by persons 21 years or older to an infraction with a fine not to exceed fifty dollars. Current City ordinances and state law, K.S.A. 21-5706 and K.S.A. 21-5709, establish that possession of marijuana and drug paraphernalia are criminal offenses with a fine not to exceed \$2,500 and/or imprisonment of up to twelve (12) months in the Sedgwick County Jail.

A concern regarding this option, is whether the proposed ordinance conflicts with state law. If the ordinance is found to conflict with state law, it would be void. If passed by the City Council, the ordinance cannot be amended or repealed by the City Council for a period of ten years.

**Call for an election.**

The City Council may call for an election. Any election must be held not more than 90 days following certification of the petition by the Election Commissioner. The election could be held during the City Council and Mayoral Elections on April 7, 2014.

Passage of the ordinance by the general public, will not cure any legal issues posed by the proposed ordinance.

**File an Action in Sedgwick County District Court for an opinion regarding the validity of the ordinance.**

K.S.A. 25-3601 allows the City to file an action in District Court, seeking an opinion as to whether the proposed ordinance is valid. The statute requires the District Court to render an opinion on the validity of the petition and underlying ordinance within 20 days of filing.

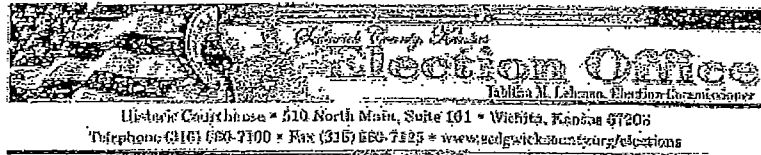
**Financial Considerations:** Lost revenue will occur in the reduction of fines for first time offenses, as well as diversion fines and fees for these offenses. It is estimated that a decrease of approximately \$100,000 in Municipal Court revenue will occur annually. There will be minimal effect on jail fees paid by the City for these offenses. A sampling of jail fee billings indicate that less than \$500 per month is assessed for defendants who are being held only on drug related charges.

Costs for the notice for the elections will be the responsibility of the City. It is estimated that this will be less than \$2,500.

**Legal Considerations:** The proposed ordinance calling for the election, the notice of election and the ordinance reducing the penalties for these offenses have been prepared and reviewed by the Law Department. Any proposed ordinance establishing penalties for possession of marijuana less than those established by state law would be in conflict with state law. Prosecution of individuals under a void ordinance could subject the City to claims of malicious prosecution and liability under 42 U.S.C. 1983. Any convictions under such an ordinance would be void as a matter of law.

**Recommendations/Actions:** It is recommended that the City Council consider three options. Option 1: Approve the ordinance passing the requested ordinance and place it on first reading. Option 2: Approve the ordinance calling for a special election and direct the clerk to publish the appropriate notices of Election. Option 3: Direct staff to file an action in the Sedgwick County District Court for an opinion regarding the validity of the proposed ordinance.

**Attachments:** Petition, Certification of Election Commissioner, Proposed Marijuana Ordinance and Proposed Election Ordinance.



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JAN 14 '15

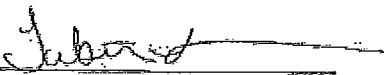
CITY CLERK OFFICE

### Certificate of Commissioner of Elections

I, Tabitha Lehman, Commissioner of Elections of Sedgwick County, Kansas, do hereby certify that my staff and I have reviewed the petition signature pages received by our office on January 7<sup>th</sup>, 2015 and have found the following:

- The petition pages contain the signatures of at least 3,000 qualified electors of the City of Wichita.
- The petition contains an additional 129 pages that have not been reviewed and those pages certainly contain the signatures of more qualified electors of the City.

Witness my hand and official seal this 14th day of January, 2015.

  
Tabitha Lehman  
Commissioner of Elections  
Sedgwick County, Kansas

ORDINANCE NO. 49-936

AN ORDINANCE PURSUANT TO K.S.A. 12-3013, SUBMITTING THE QUESTION OF PASSAGE OF AN ORDINANCE REDUCING THE CRIMINAL PENALTIES FOR POSSESSION OF MARIJUANA BY THE CITY OF WICHITA TO THE VOTERS OF THE CITY OF WICHITA, ESTABLISHING THE BALLOT QUESTION AND CALLING FOR A NON-PARTISAN SPECIAL ELECTION.

WHEREAS, on January 7, 2015, a petition, pursuant to K.S.A. 12-3013, was submitted to the City Clerk proposing passage of an ordinance of the City of Wichita which would reduce the criminal penalty for possession of marijuana and marijuana paraphernalia.

WHEREAS, on January 14, 2015, the Sedgwick County Elections Office verified that a sufficient number of signatures were contained on the petition filed with the City Clerk to require the City Council to consider the proposed ordinance.

WHEREAS, the City Council has heard public comment regarding the proposed ordinance and finds that the issue should be submitted to a vote of the public.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WICHITA:

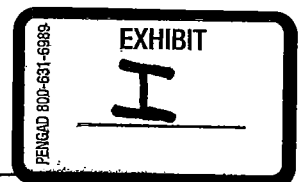
**SECTION 1.** Pursuant to K.S.A. 12-3013, after careful and thoughtful consideration of the proposed ordinance, the City Council determines that it is in the public's interest to submit this question to a vote of the citizens of the City of Wichita.

**SECTION 2. Ballot Question.** The ballot question shall read as follows:

Ballot Question:

SHALL THE FOLLOWING BE ADOPTED?

An ordinance reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of cannabis sativa L, otherwise known as marijuana,





and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00).

YES \_\_\_\_\_ NO \_\_\_\_\_

**SECTION 3. Notice and Call of Election.**

A. Pursuant to K.S.A. 12-3013, the Wichita City Council hereby gives notice of and calls for a non-partisan special election to be held in the City of Wichita, Kansas on April 7, 2015 to submit to the qualified voters of the City the question of whether the proposed ordinance should be adopted.

B. Such election shall be conducted by the Sedgwick County Election Commissioner and held in the manner and in accordance with the laws of the State of Kansas, including but not limited to K.S.A. 25-2601 et seq.

C. Only the qualified electors registered to vote under the laws of the State of Kansas, in the City of Wichita, Kansas, may vote on the question as set forth; and the question must be approved by a majority of the voters thereon at the election.

**SECTION 4. Publication.** The City Clerk is hereby directed to publish this ordinance on March 24, 2015 and March 31, 2015 in the official City newspaper.

PASSED by the governing body on this 3rd day of February, 2015.

\_\_\_\_\_  
Carl Brewer, Mayor

ATTEST:

\_\_\_\_\_  
Karen Sublett, City Clerk

APPROVED AS TO FORM:

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Sharon L. Dickgrafe  
Interim City Attorney



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT  
ATTORNEY GENERAL

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.AG.KS.GOV

March 5, 2015

ATTORNEY GENERAL OPINION NO. 2015- 4

The Honorable Mark Kahrs  
State Representative, 87th District  
State Capitol, Room 286-N  
300 S.W. 10th Avenue  
Topeka, Kansas 66612

The Honorable Steven R. Brunk  
State Representative, 85th District  
State Capitol, Room 285-N  
300 S.W. 10th Avenue  
Topeka, Kansas 66612

Re: Constitution of the State of Kansas—Corporations—Cities' Powers of Home Rule.

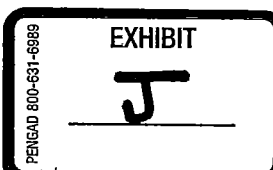
Cities and Municipalities—Ordinances of Cities—Initiative and Referendum Ordinances—Petition for Proposed Ordinances; Requirements; Passage or Election; Form of Ballot Approval, effect; Amendment or Repeal; Publication

Synopsis: A city would exceed the city's home rule powers by adopting an ordinance that is preempted because it conflicts with a uniform state criminal statute. Thus, the ordinance would be void. Cited herein: K.S.A. 12-3013; K.S.A. 2014 Supp. 12-4106; K.S.A. 12-4111; 21-2501a; K.S.A. 2014 Supp. 21-5102; 21-5705; 21-5706; 21-5709; 21-6602; 21-6611; 21-6810; K.S.A. 22-2202; K.S.A. 2014 Supp. 65-4105; Kan. Const. Art. 2, § 17 and Kan. Const. Art 12 § 5; 18 U.S.C. § 922; 27 C.F.R. § 478.11.

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Dear Representatives Kahrs and Brunk:

As State Representatives for the 87<sup>th</sup> and 85<sup>th</sup> Districts, respectively, you ask our opinion whether the proposed amendments to Section 5.26.040 of the Code of the City of Wichita, Kansas, would be preempted by state law because the amendments would conflict with uniform state statutes. In our opinion, the answer is yes.

### ***Background***

K.S.A. 12-3013 prescribes the procedure that city electors may, by petition, initiate to directly propose and enact local legislation independent of the local governing body. If the petition is signed by the requisite number of qualified electors, the governing body must either enact the ordinance without alteration or hold an election. If an election is held and the majority of the electorate votes in favor of the proposed ordinance, the ordinance becomes valid and binding without alteration.<sup>1</sup> Such ordinance shall not be repealed or amended except by a vote of the electors at a subsequent election or by the governing body after passage of 10 years from the effective date.<sup>2</sup> The initiative and referendum process is not available for proposed ordinances that are administrative ordinances, ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments, or ordinances subject to referendum or election under another statute.<sup>3</sup>

Attorney General opinions rely on the facts presented in the opinion request or obtained from interested parties.<sup>4</sup> You provided us a copy of a blank petition that included what appears to be a copy of amendments proposed by the Marijuana Reform Initiative to Section 5.26.040 of the Code of the City of Wichita, Kansas (hereafter, "proposed ordinance"), which is file-stamped October 15, 2014. The petition was filed with the City Clerk on January 7, 2015.<sup>5</sup> The proposed ordinance was not included in or attached to the petition filed with the City Clerk.<sup>6</sup> On January 27, 2015, the City Council adopted

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<sup>1</sup> K.S.A. 12-3013(b) and (c).

<sup>2</sup> K.S.A. 12-3013(c).

<sup>3</sup> K.S.A. 12-3013(e)(1), (2), and (3).

<sup>4</sup> We do not opine on whether the petition and proposed ordinance comply with the requirements of K.S.A. 12-3013 and thus, whether the question may properly be placed on the ballot. However, because the proposed ordinance was not filed with the petition, as required by K.S.A. 12-3013, we are unable to confirm what ordinance language, if any, would be on the ballot. This filing deficiency suggests a threshold procedural infirmity from the facts that are known to us. It also is unclear to us whether the subject matter within the proposed ordinance is a legislative matter that may be proposed by initiative or whether the process used was legally impermissible for the ordinance proposed. If the proposed ordinance is determined to be administrative, it is not subject to initiative and referendum pursuant to K.S.A. 12-3013(e)(1). We note that the proposed ordinance contains elements that appear to be administrative in nature, such as the provisions regarding the reporting and handling of criminal justice information.

<sup>5</sup> *Minutes*, City of Wichita City Council Meeting, January 27, 2015.

<sup>6</sup> *Id.*

Ordinance No. 49-936 to submit the ballot question to a vote of the citizens of the City of Wichita.<sup>7</sup>

The language presented to us from the petition circulated by the Marijuana Reform Initiative and from Ordinance No. 49-936 adopted by the City is as follows:

SHALL THE FOLLOWING BE ADOPTED?

An ordinance reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of criminal sativa L, otherwise known as marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00).

YES \_\_\_\_\_ NO \_\_\_\_\_

The language from the proposed ordinance is as follows:<sup>8</sup>

SECTION 5.26.040 OF THE MUNICIPAL CODE OF THE CITY OF WICHITA, KANSAS, SHALL BE REPEALED IN ITS ENTIRETY AND THE SUBSTITUTE PROVISIONS SET FORTH BELOW SHALL BE ADOPTED.

(a) Except as provided at Subsections (b) and (c) herein, a violation of the provisions of this Chapter is a misdemeanor and, upon conviction, the sentence shall be a fine not to exceed two thousand five hundred dollars (\$2,500.00), and/or imprisonment of up to twelve (12) months in the Sedgwick County Jail.

(b) A conviction of any person twenty-one (21) years of age or older of Section 5.26.010 for possession of one [sic] (32) grams or less of cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], for the first offense, is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or

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<sup>7</sup> *Id.*

<sup>8</sup> This language was provided to us with the opinion request, and we have compared it with language provided to us at our request by the City of Wichita and also with language posted on the website for the Marijuana Reform Initiative. All three versions appear to be identical; thus, we presume this is the language that is in fact proposed for adoption by Wichita electors. However, we cannot confirm that as a matter of law because no ordinance was filed with the petition as required by K.S.A. 12-3013.

rehabilitative measure, shall be imposed; however, pursuant [sic] Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant [sic] Section 1.06.010 *et seq.*

(c) A conviction of any person twenty-one (21) years of age or older of Section 5.26.030 for possession of drug paraphernalia, as defined by Section 5.25.005(f), for the first offense, involving cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed; however, pursuant [sic] Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant [sic] Section 1.06.010 *et seq.*

(d) The intent of Subsections (b) and (c) of this Chapter is to reduce first offense convictions pursuant [sic] Sections 5.26.010 and 5.26.030 for cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], to be an infraction, and not a misdemeanor. For the purpose of determining whether a conviction is a first or subsequent offense under Subsections (b) and/or (c), any conviction or convictions resulting from the same incident occurring after July 1, 2015, shall constitute a first offense and any subsequent conviction or convictions occurring within one (1) year thereafter shall constitute a subsequent offense. Nothing herein shall be construed to restrict law enforcement officers of the City of Wichita, Kansas, to complain of violations of offenses other than Subsections (b) and (c) of this Chapter. No law enforcement officer of the City of Wichita, Kansas, or his or her agent, shall complain of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas; and, furthermore, the City Attorney of the City of Wichita, Kansas, or any of his or her authorized assistants, shall not refer any said complaint to any other authority for prosecution. No convictions pursuant [sic] Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.

(e) Should the State of Kansas enact lesser penalties than that set forth in Subsections (b) and (c) of this Chapter for possession of cannabis sativa L., or otherwise known as marijuana, as described therein, or possession of drug paraphernalia, as further described therein, then these Subsections, or relevant portions thereof, shall be null and void. The invalidity or unenforceability of any provisions of Subsections (b) and (c) shall not affect the validity or enforceability of other provisions thereof, which shall remain in full force and effect.

(f) In addition to any other sentence authorized by this Chapter, any person convicted of having violated the terms of this Chapter, while under twenty-one (21) years of age, shall be ordered to submit to and complete a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008 and amendments thereto and to pay a fee for such evaluation. If the judge finds that the person is indigent, the fee may be waived.

Currently, Section 5.26.040 of the Code of the City of Wichita, Kansas, provides that a conviction for possession of marijuana or of drug paraphernalia related to marijuana is a misdemeanor punishable by a fine not to exceed \$2,500 and/or imprisonment in the county jail for up to 12 months. These crimes and penalties are parallel to those crimes and penalties provided for in state statute.<sup>9</sup>

### *Preemption*

The principle that cities cannot enact laws that contradict state law is found in the Home Rule Amendment to the Kansas Constitution.<sup>10</sup> The Home Rule Amendment grants cities the power to enact legislation to govern local affairs, "subject only to enactments of the legislature of statewide concern applicable uniformly to all cities [and] to other enactments of the legislature applicable uniformly to all cities . . . ."<sup>11</sup> In addition, the Home Rule Amendment states that city home rule powers "shall be liberally construed for the purpose of giving to cities the largest measure of self-government."<sup>12</sup>

Cities' home rule power is not unlimited. "[H]ome rule power does not authorize cities to act where the state legislature has precluded municipal action by clearly preempting the field with a uniformly applicable enactment."<sup>13</sup> Kansas courts have identified two means by which a state statute may overrule a city's home rule power: (1) if there is a conflict

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<sup>9</sup> K.S.A. 2014 Supp. 21-5706 and 21-5709.

<sup>10</sup> Kan. Const. Art. 12, § 5.

<sup>11</sup> Kan. Const. Art. 12, § 5(b).

<sup>12</sup> Kan. Const. Art. 12, § 5(d).

<sup>13</sup> *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, 269 Kan. 670, 673 (2000).

between the local regulation and a state statute; or (2) if the state legislature has preempted the field of regulation.<sup>14</sup>

An “[e]nabling act is uniformly applicable to all cities or counties if it authorizes all cities or counties to perform certain acts. Such statutes are state law and preempt the field of their application without use of preemptive language, unless there are express exceptions in the statutes or unless the statutes pertain to police power regulations.”<sup>15</sup> By court-imposed exception to constitutional and statutory home rule, a “[m]unicipality has the right to legislate by ordinary ordinance or resolution *nonconflicting* local police power laws even though there are state laws on the subject uniformly applicable to all municipalities.”<sup>16</sup> The issue at the core of your question, therefore, is whether the proposed ordinance, which relates to the city’s exercise of its police power, would conflict with state law. If the proposed ordinance would be in conflict with state law, then it is preempted and the city lacks power or authority to enact it.

A local ordinance is conflict preempted where it permits what the state statute forbids or prohibits what the statute authorizes.<sup>17</sup> The Kansas Supreme Court has found there is no conflict between the provisions of a local ordinance and state law when the ordinance is parallel or identical to the state law,<sup>18</sup> the ordinance supplements or adds to the state law,<sup>19</sup> or the ordinance provides for standards of performance that are higher than those set by state law.<sup>20</sup> In contrast, the Supreme Court has held that a city cannot classify a crime as a misdemeanor in an ordinance when the Kansas Legislature has classified the crime in state statute as a felony.<sup>21</sup>

What is apparent from these cases is that uniform state law establishes a *minimum standard* that must be met by the local ordinance if the city intends to use its police power to exercise concurrent jurisdiction with the state. Where a city ordinance provides a standard below the minimum standard set by the state, the ordinance is in conflict with the state law and is invalid.

Drug laws, statutory powers and duties of law enforcement officers and criminal information reporting statutes are plainly enactments of the legislature that are of

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<sup>14</sup> *State ex rel. Kline v. Bd. of Comm’rs of Unified Gov’t of Wyandotte County/Kansas City*, 277 Kan. 516, 526-27 (2004), citing *City of Junction City v. Lee*, 216 Kan. 495, 498-499 (1975) (superseded by statute as stated in *Blevins v. Hiebert*, 247 Kan. 1 (1990)).

<sup>15</sup> *Blevins v. Hiebert*, 247 Kan. 1, 11 (1990).

<sup>16</sup> 247 Kan. at 8 (emphasis added).

<sup>17</sup> 216 Kan. at Syl. ¶ 6.

<sup>18</sup> *City of Garden City v. Miller*, 181 Kan. 360 (1957).

<sup>19</sup> *Hutchinson Human Relations Commission v. Midland Credit Management, Inc.*, 213 Kan. 308 (1973).

<sup>20</sup> *Leavenworth Club Owners Association v. Atchison*, 208 Kan. 318 (1971).

<sup>21</sup> See *State v. Jenkins*, 295 Kan. 431, 442 (2012) (a city cannot classify third and subsequent offenses for theft as a misdemeanor where a state statute classifies such offenses as a felony) and *City of Junction City v. Cadoret*, 263 Kan. 164, 170 (1997) (a city cannot classify third and subsequent offenses for driving under the influence as a misdemeanor where a state statute classifies such offenses as a felony).



statewide concern and that apply uniformly to all cities.<sup>22</sup> In our view, the proposed ordinance would impermissibly conflict with uniform state law as discussed below.

### *I. Possession of Marijuana*

K.S.A. 2014 Supp. 21-5706(b)(3) provides that it is unlawful for any person to possess a controlled substance, including "any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105." Marijuana is such a controlled substance.<sup>23</sup> The first conviction for possession of marijuana is a class A nonperson misdemeanor offense.<sup>24</sup> A class A nonperson misdemeanor is punishable by a fine not to exceed \$2,500<sup>25</sup> and/or imprisonment in the county jail for up to 12 months.<sup>26</sup>

In its current form, Section 5.26.040(a) is parallel to K.S.A. 2014 Supp. 21-5706 and thus is valid. However, Section (b) of the proposed ordinance would eliminate the parallel between state law and the city ordinance by decreasing the penalty for the first offense conviction for possession of 32 grams or less of Cannabis sativa L. by any person 21 years or older and by changing the penalty from a misdemeanor to "an infraction" punishable only by "a fine not to exceed fifty dollars (\$50.00)," an amount less than what is authorized by state statute. Section (b) of the proposed ordinance would conflict with state law in at least four ways.

First, the proposed ordinance impermissibly attempts to lower the penalty established by state law for certain illegal conduct. The Kansas Supreme Court in *State v. Jenkins*<sup>27</sup> held that cities can adopt an ordinance relating to a local police power, even though there is a state law on the subject uniformly applicable to all municipalities, as long as the ordinance does not conflict with the state statute. In *Jenkins*, the Court found a conflict when a city ordinance classified the offense as a misdemeanor, but the legislature had classified the crime as a felony.<sup>28</sup>

The permissible classifications of crimes are established by state law. Under the Kansas Criminal Code, a crime is defined as:

An act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine, is

<sup>22</sup> See Kan. Const. Art. 2, § 17 which provides that all laws of a general nature shall have a uniform operation throughout the state; *Blevins v. Hiebert*, 247 Kan. 1, 11 (1990).

<sup>23</sup> K.S.A. 2014 Supp. 65-4105(d)(16).

<sup>24</sup> K.S.A. 2014 Supp. 21-5706(c)(2)(A).

<sup>25</sup> K.S.A. 2014 Supp. 21-6611(b)(1).

<sup>26</sup> K.S.A. 2014 Supp. 21-6602(a)(1).

<sup>27</sup> 295 Kan. 432, 442 (2012).

<sup>28</sup> Whether the *Jenkins* opinion relied on the fact that the city did not have jurisdiction over the felony offense is irrelevant here. The municipal court has jurisdiction to hear and determine cases involving violations of ordinances of a city, including concurrent jurisdiction over felony possession of marijuana. See K.S.A. 2014 Supp. 12-4104.

authorized or, in the case of a traffic infraction or a cigarette or tobacco infraction, a fine is authorized. Crimes are classified as felonies, misdemeanors, traffic infractions and cigarette or tobacco infractions.<sup>29</sup>

The criminal code does not recognize the general term "infraction" as a classification, only "traffic infraction" and "tobacco infraction." Thus, the conflict between the proposed ordinance and state law is even more acute than the conflict found impermissible by the Supreme Court in *Jenkins*. In *Jenkins*, the Supreme Court rejected a city's attempt to reclassify certain criminal conduct from one category recognized by state law, a felony, to a lesser category recognized by state law, a misdemeanor. But here, not only would the proposed ordinance recategorize certain criminal conduct to a lesser category, but the lesser category it proposes – "an infraction" – is not recognized by state law. Because Kansas does not authorize the classification of "an infraction" generally, nor specifically for the crime of possession of marijuana, the proposed amendment to Section 5.26.040 would conflict with Kansas law.

That conclusion is buttressed because the proposed reclassification would reduce the available penalty by eliminating the potential for jail time and lowering the amount of the fine to less than what is established by state law. The elimination of jail time as a sentencing option and the reduction in the potential fine would not supplement or add to the state law but instead would lower the standard established by state law. Thus, we believe that where the legislature classified certain criminal acts as felonies or misdemeanors, a city ordinance conflicts with state law when it attempts to reclassify the same acts to be infractions subject to lesser penalties.

Further, because the proposed ordinance does not treat a first offense conviction as a misdemeanor, it would have the effect in many cases of indirectly reclassifying conduct that currently is a felony under state law – subsequent convictions for possession of marijuana – as a lesser offense. This effect results from the requirement in the proposed ordinance that a first conviction for marijuana possession may be counted as a prior conviction in fewer circumstances than under state law. The effect is that at least one additional conviction, beyond the requirements of state law, would be necessary before an individual could be convicted of felony possession of marijuana. In this manner, the reclassification in the proposed ordinance undermines the state felony statute by causing certain repeat conduct that currently is punishable as a felony to instead be punishable only as a lesser offense, even under state law. This provision is not parallel to but instead is below the standard set by the state, and thus there is a conflict that precludes municipal action.

Second, to the extent subsection (d) of the proposed ordinance attempts to create a one-year decay period that would redefine a second conviction one year or more after the first offense conviction so that it is counted only as another first conviction, such attempt would be impermissible as conflicting with K.S.A. 2014 Supp. 21-6810(d)(3)(A). State law recognizes no such decay factor for prior convictions. Because the provision

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<sup>29</sup> K.S.A. 2014 Supp. 21-5102.

would make it possible to have numerous “first convictions” for possession of marijuana, as long as each conviction is spaced more than one year apart from the prior conviction, an individual’s criminal history potentially would never accumulate. This would undermine the provisions of state law that provide for increasing penalties for repeat offenses for the crime of possession of marijuana, and ultimately would undermine felony provisions of state law that would attach (without the decay period) to subsequent convictions for possession of marijuana, regardless of the timing.

Third, the ordinance proposes to establish an amount of marijuana as the demarcation for classification as an “infraction” rather than a misdemeanor, effectively adding an additional factual element the prosecution must prove. Currently, possession of a specific amount of marijuana is not required to be alleged or proven by the prosecution because it is not an element of the crime in either the current ordinance or in state law. Whereas possession of a small amount of marijuana is a misdemeanor under state law and must be considered and scored in criminal history pursuant to K.S.A. 2014 Supp. 21-6810(d)(5), the proposed ordinance would reclassify the possession of that same amount of marijuana, up to 32 grams, as an infraction.

The statute and the ordinance would no longer be parallel, and the ordinance would conflict with state law since the ordinance is seeking to remove a crime that must be considered and scored for criminal history purposes. It would undermine the city’s jurisdiction over the prosecution of felony possession of marijuana under K.S.A. 2015 Supp. 12-4104(a)(5) or the state’s prosecution for the same under K.S.A. 2014 Supp. 21-5706(b)(3) because the criminal history score would be inaccurate in the event of any subsequent convictions for possession of marijuana.

Fourth, the ordinance proposes to impose an age restriction by allowing persons 21 years or older to receive a more lenient sentence. Under state law, adult convictions do not require a specific age to be alleged or proven in a prosecution for possession of marijuana. The addition of this age factor appears to be another way to prevent the attachment of criminal history as stated above. Again, the statute and ordinance would no longer be parallel, and the ordinance would allow conduct that state law prohibits and undermine the state system of collecting accurate criminal history in order to enhance the penalties for recidivist marijuana possession convictions accordingly.

In our opinion, any one or more of the above conflicts between the proposed ordinance and state law would result in conflict preemption of the proposed ordinance, rendering it void.

## *II. Possession of Drug Paraphernalia related to Marijuana*

K.S.A. 2014 Supp. 21-5709(b)(2) makes it unlawful for any person to use or possess with intent to use any drug paraphernalia to “store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.” The first

and subsequent convictions of possession of paraphernalia are class A nonperson misdemeanor offenses.<sup>30</sup>

In its current form, Section 5.26.040(a) of the Code of the City of Wichita, Kansas, is parallel to K.S.A. 2014 Supp. 21-5709 and thus is valid. However, Section (c) of the proposed ordinance would eliminate the parallel between state law and the city ordinance by decreasing the penalty for the first offense conviction for possession of drug paraphernalia involving Cannabis sativa L. by any person 21 years or older. If the proposed ordinance were adopted by the electors in Wichita, Section 5.26.040 would be amended so that a first conviction of the offense as redefined by the proposed ordinance would be "an infraction" punishable by "a fine not to exceed fifty dollars (\$50.00)." Section (c) of the ordinance would conflict with state law in at least two ways.

First, the proposed ordinance impermissibly attempts to lower the penalty established by state law from a class A misdemeanor to an infraction. In accord with the analysis above, the Kansas Criminal Code does not recognize the term "infraction" as a classification in this context. An ordinance that purports to lower the classification of a crime below that set by the state law is in conflict with state law and is void.

Additionally, such classification conflicts with state law because it lessens the potential penalty from the standard that is provided for by state law.

Second, the proposed ordinance singles out persons 21 years or older to receive a lesser penalty for a conviction, which would render the ordinance no longer parallel to state law. As stated above, a city ordinance cannot classify the same acts to be a lesser offense than provided for in state law without causing a conflict. This proposed reclassification appears to be another way to prevent attachment of criminal history which is required to be considered and scored pursuant to K.S.A. 2014 Supp. 21-6810(d)(5).

Either one of the above conflicts between the proposed ordinance and state law would result in conflict preemption of the proposed ordinance, rendering it void.

### *III. Duties of Law Enforcement Officers to Enforce State Law*

Section (d) of the proposed ordinance proposes to prohibit City of Wichita law enforcement officers from complaining "of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas." That *de facto* gag rule for Wichita police officers, if enacted, would directly conflict with the duties of all Kansas law enforcement officers, including those employed by the City of Wichita, as set forth in state statute.

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<sup>30</sup> K.S.A. 2014 Supp. 21-5709(e)(3).

K.S.A. 12-4111 provides:

The governing body [of a city] may employ law enforcement officers who shall have power to execute all process issued by any municipal judge within the state and delivered to him or her for that purpose, to detain persons, to place them in custody, and to arrest them, pursuant to the terms of this act.

*The powers of law enforcement officers with respect to the code of criminal procedure shall not be reduced by this code.*<sup>31</sup>

The very definition of a "law enforcement officer" under Kansas law is, *inter alia*, a person who "make[s] arrests for violation of the laws of the state of Kansas . . . ." A city ordinance that purports to prohibit a "law enforcement officer" from enforcing state law would be in clear conflict with the K.S.A. 22-2202(13), which defines "law enforcement officer" as follows:

"Law enforcement officer" means any person who by virtue of office or public employment is *vested by law with a duty* to maintain public order or *to make arrests for violation of the laws of the state of Kansas* or ordinances of any municipality thereof or with a duty to maintain or assert custody or supervision over persons accused or convicted of crime, and includes court services officers, parole officers and directors, security personnel and keepers of correctional institutions, jails or other institutions for the detention of persons accused or convicted of crime, while acting within the scope of their authority.<sup>32</sup>

Kansas law enforcement officers, including those employed by the City of Wichita, have a legal duty to enforce state law, which necessarily includes the authority to present cases for prosecution when appropriate to state authorities. A local ordinance, such as the proposed ordinance, that proposes to direct law enforcement officers to abandon that statutory duty is in conflict with state law and void.

#### *IV. Offense Recording and Reporting by City Police*

Section (d) of the proposed ordinance also would prohibit City of Wichita law enforcement officers from recording a misdemeanor for a conviction of section (b) or (c) with any state or federal law enforcement reporting agency.

An ordinance which purports to prohibit a law enforcement officer from recording or reporting a misdemeanor for a conviction of section (b) or (c) of the proposed ordinance

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<sup>31</sup> Emphasis added.

<sup>32</sup> Emphasis added.

to any state or federal law enforcement reporting agency would be in clear conflict with K.S.A 21-2501a which provides:

(a) All law enforcement agencies having responsibility for law enforcement in any political subdivision of this state, on forms approved by the attorney general, shall maintain a permanent record of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions.

(b) All law enforcement agencies having the responsibility of maintaining a permanent record of offenses shall file with the Kansas bureau of investigation, on a form approved by the attorney general, a report on each offense for which a permanent record is required within 72 hours after such offense is reported or known to have been committed.

By prohibiting City of Wichita law enforcement officers, and/or the Wichita Police Department, from fulfilling statutory obligations to report crimes committed in the city, the proposed ordinance would undermine the purpose of the state statute described above, which is to ensure the accurate compilation of criminal justice information in Kansas. The resulting inaccuracy injected into criminal history record information because of the reporting ban would cause other significant problems in addition to future sentencing inaccuracies. We do not attempt to discern them all here, but one example would be the effect on prosecutions under 18 U.S.C. § 922(g)(3), the federal law prohibiting certain marijuana users from possession of any firearms or ammunition.<sup>33</sup>

The proposed ordinance would conflict with and undermine state law and, thus, would be void.

#### *V. Reporting of Offenses by Municipal Judge*

Additionally, the municipal judge is under a separate duty, pursuant to K.S.A. 12-4106(e), to ensure that "information concerning dispositions of city ordinance violations that result in convictions comparable to convictions for offenses under Kansas criminal statutes is forwarded to the Kansas bureau of investigation central repository. This information shall be transmitted, on a form or in a format approved by the attorney general, within 30 days of final disposition."

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<sup>33</sup> 18 U.S.C. § 922(g)(3) provides, "It shall be unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." See also 27 C.F.R. § 478.11, which describes the meaning of "unlawful user of or addicted to any controlled substance."

Subsection (d) of the proposed ordinance states, in pertinent part:

No convictions pursuant [sic] Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.

The proposed ordinance would improperly redefine conduct made criminal by state law so that it is no longer "comparable to convictions for offenses under Kansas criminal statutes." In so doing, it would undermine the purpose of the state statutory system of reporting, which is to ensure the accurate compilation of criminal justice information in Kansas. A city ordinance that purports to prohibit, either directly or by such redefinition, a municipal judge from making a report as required by K.S.A. 2014 Supp. 12-4106(e) would be in clear conflict with the state law and would be void.

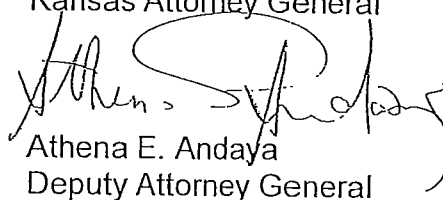
### ***Conclusion***

Based upon the above analysis, we conclude that a court would find the proposed ordinance void because it would conflict with uniform state laws in numerous ways. In our opinion, even if the ordinance has been properly placed upon the April ballot – and we are unsure that it has been<sup>34</sup> – a public vote to adopt it would have no legal force or effect.

Sincerely,



Derek Schmidt  
Kansas Attorney General



Athena E. Andaya  
Deputy Attorney General

DS:AA:sb

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<sup>34</sup> See footnote 4 above.

## **Andaya, Athena**

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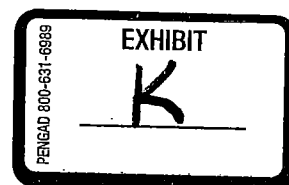
**From:** Pfeifer, Delberta  
**Sent:** Thursday, March 05, 2015 4:46 PM  
**To:** 'sdickgrafe@wichita.gov'  
**Cc:** Andaya, Athena  
**Subject:** Attorney General Opinion 2015-4  
**Attachments:** AGO 2015-4 Signed.pdf; 20150305 WichitaOrdinanceLetter.pdf

Ms. Dickgrafe,

Attached please find a letter from Attorney General Schmidt and Attorney General Opinion 2015-4. Hard copy will follow in U.S. Mail.

Delberta

Delberta G. Pfeifer, Executive Assistant  
Office of Kansas Attorney General Derek Schmidt  
120 SW 10th Avenue, 2nd Floor  
Topeka, KS 66612-1597  
785-296-2218 Phone  
785-296-3131 Fax  
[Delberta.Pfeifer@ag.ks.gov](mailto:Delberta.Pfeifer@ag.ks.gov)  
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STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT  
ATTORNEY GENERAL

March 5, 2015

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.AG.KS.GOV

Ms. Sharon Dickgrafe  
Interim City Attorney and Director of Law  
455 N. Main, 13<sup>th</sup> Floor  
Wichita, KS 67202

**Re: Proposed city code revisions regarding criminal  
possession of marijuana and related matters**

Dear Ms. Dickgrafe:

I have today issued Attorney General Opinion 2015-4, which is enclosed, related to the proposed revisions to Section 5.26.040 of the Code of the City of Wichita, Kansas ("proposed ordinance"). It is my understanding that the City of Wichita ("City") intends to present the proposed ordinance to City electors at the April ballot. The Office of Attorney General has reviewed the proposed ordinance and has concluded it may not lawfully be adopted for the following reasons:

First, no copy of the proposed ordinance was filed with the City Clerk along with the citizen petition as required by K.S.A. 12-3013(a). Therefore, the process followed did not meet the statutory requirements for ordinances to be proposed by initiative and referendum.

Second, the proposed ordinance appears to contain significant subject matter that is administrative in nature, specifically those provisions that purport to bind law enforcement officers and municipal judges to certain processes for the administrative reporting of various types of criminal justice information. Pursuant to K.S.A. 12-3013(e), ordinances that are administrative in nature may not be placed on the ballot through the initiative and referendum process.

Third, as described in Attorney General Opinion 2015-4, the proposed ordinance, if approved by City electors, would conflict with uniform state law in numerous ways and would be void *ab initio* and of no legal effect. Under the Kansas Constitution, the City lacks legal authority to adopt this ordinance that conflicts with state law.

Sharon Dickgrafe  
March 5, 2015  
Page 2 of 2

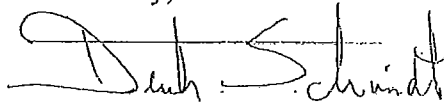
The Kansas Constitution vests the state's legislative power in the Kansas Legislature.<sup>1</sup> It is the Legislature, not the Wichita City Council, that possesses the legal authority to change state law. As set forth in Attorney General Opinion 2015-4, the Legislature has exercised its constitutional power to enact uniform state laws governing hallucinogenic drugs including marijuana, drug paraphernalia, the duties of law enforcement officers, and the collection of criminal justice information. The City has no constitutional or other legal authority to enact any ordinance in conflict with those legislative enactments. The City Council Members in Wichita are sworn to uphold the Kansas Constitution.<sup>2</sup>

All citizens have a constitutional right to petition their government for a redress of grievances.<sup>3</sup> However, those who have petitioned the Wichita City Council on this matter have directed their grievances to a governing body that lacks authority to redress them. The citizens who favor the policies contained within the proposed ordinance are free to urge state legislators to amend state law or to present a petition to the Legislature to adopt such policies in state law, and both the Senate and the House of Representatives have provided in their rules for the receiving of such petitions.<sup>4</sup>

Please be advised that in the event the City proceeds to present this proposed ordinance for a public vote, and if a majority of votes cast were to favor its adoption, the proposed ordinance would nonetheless be of no legal force or effect. In that circumstance, I would be required to file suit to enforce state law by seeking judicial confirmation of the ordinance's invalidity. My preference would be to avoid the cost and burden of litigation, both for the City and the state, and I therefore respectfully request that the City take the necessary steps to prevent this unlawful proposal from presentation at the April ballot.

If you have any questions, please feel free to contact me or Assistant Attorney General Lisa Mendoza at (785) 296-2215.

Sincerely,



Derek Schmidt  
Kansas Attorney General

Enclosure (A.G. Opinion 2015-4)

cc: Members of the Wichita City Council  
Tabitha Lehman, Sedgwick County Election Commissioner  
Kris Kobach, Secretary of State

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<sup>1</sup> Kan. Const., Art. 2, § 1.

<sup>2</sup> See K.S.A. 75-4308; see also K.S.A. 54-106.

<sup>3</sup> Kan. Const., Bill of Rights, § 3; U.S. Const. Amend. 1.

<sup>4</sup> Senate Rule No. 4; House of Representatives Rules, Nos. 104, 4303 and 4304.

SHARON L. DICKGRAFE  
Interim City Attorney  
City Hall - 13th Floor  
455 N. Main  
Wichita, Kansas 67202  
(316) 268-4681

FILED  
CIVIL DIVISION  
2015 APR -9 A 9:11

IN THE EIGHTEENTH JUDICIAL DISTRICT  
DISTRICT COURT, SEDGWICH COUNTY, KANSAS  
CIVIL DEPARTMENT

COPY

CITY OF WICHITA, KANSAS  
a municipal corporation

Plaintiff,

v.

Janice Bradley, Individually and  
as a Representative of Marijuana  
Reform Initiative-ICT

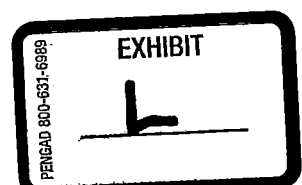
Defendant.

Case No. 15CV0910

PETITION FOR DECLARATORY JUDGMENT

COMES NOW, the City of Wichita, Kansas, by and through its attorney, Sharon L. Dickgrafe, Interim City Attorney, pursuant to K.S.A. 60-1701 et seq. and K.S.A. 25-3601, alleges and states the following:

1. Plaintiff is a municipal corporation and first class city, organized and existing under the laws to the State of Kansas.
2. Defendant, Janice Bradley, is a resident of Sedgwick County, Kansas, and can be served at 214 W. Buckeridge Court, Wichita, Kansas 67203.



3. Defendant, individually and as a representative of the Marijuana Reform Initiative-ICT, has signed and circulated the petition attached hereto as Exhibit A requesting the passage of an ordinance by the City of Wichita which reduces the criminal penalty for a first time conviction for possession of 32 grams or less of marijuana to an infraction.

4. Pursuant to K.S.A. 12-3013, 25-3601 and 25-3602, the defendant filed the petition with the City Clerk on January 7, 2015, for the adoption of the following ordinance, or for submission of the same to the electors of the City of Wichita, to read as follows:

SHALL THE FOLLOWING BE ADOPTED?

An ordinance reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of criminal sativa l, otherwise known as marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00).

YES \_\_\_\_\_ NO \_\_\_\_\_

5. On October 15, 2014, the Office of the County Counselor issued an opinion to defendant stating that the form of the question contained in the petition was legally sufficient.

6. The opinion issued on October 15, 2014, by the Office of the County Counselor is a rebuttable presumption that the form of the question presented complies with K.S.A. 25-3601.

7. On January 14, 2015, the Sedgwick County Election Commission certified that defendant had obtained the necessary signatures, pursuant to K.S.A. 12-3013, to submit the proposed ordinance to a special question election.

8. K.S.A. 12-3013(a) provides that upon receipt of a petition requesting the passage of an ordinance signed by at least 25 percent of voters in a First Class City, the governing body of such City shall either pass the ordinance without alteration or call for a special election for passage of the ordinance.

9. On January 27, 2015, the Wichita City Council passed Ordinance No. 49-936 calling for a special election on April 7, 2015, regarding the proposed ordinance.

10. Although drafted by the initiative group, the actual ordinance language set forth below was not included in the petitions filed with the City Clerk. This language provided:

SECTION 5.26.040 OF THE MUNICIPAL CODE OF THE CITY OF WICHITA, KANSAS, SHALL BE REPEALED IN ITS ENTIRETY AND THE SUBSTITUTE PROVISIONS SET FORTH BELOW SHALL BE ADOPTED.

(a) Except as provided at Subsections (b) and (c) herein, a violation of the provisions of this Chapter is a misdemeanor and, upon conviction, the sentence shall be a fine not to exceed two thousand five hundred dollars (\$2,500.00), and/or imprisonment of up to twelve (12) months in the Sedgwick County Jail.

(b) A conviction of any person twenty-one (21) years of age or older of Section 5.26.010 for possession of one [sic] (32) grams or less of cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], for the first offense, is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or rehabilitative measure, shall be imposed; however, pursuant [sic] Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant [sic] Section 1.06.010 *et seq.*

(c) A conviction of any person twenty-one (21) years of age or older of Section 5.26.030 for possession of drug paraphernalia, as defined by Section 5.25.005(f), for the first offense, involving cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed; however, pursuant [sic] Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant [sic] Section 1.06.010 *et seq.*

(d) The intent of Subsections (b) and (c) of this Chapter is to reduce first offense convictions pursuant [sic] Sections 5.26.010 and 5.26.030 for cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], to be an infraction, and not a misdemeanor. For the purpose of determining whether a conviction is a first or subsequent offense under Subsections (b) and/or (c), any conviction or convictions resulting from the same incident occurring after July 1, 2015, shall constitute a first offense and any subsequent conviction or convictions occurring within one (1) year thereafter shall constitute a subsequent offense. Nothing herein shall be construed to restrict law enforcement officers of the City of Wichita, Kansas, to complain of violations of offenses other than Subsections (b) and (c) of this Chapter. No law enforcement officer of the City of Wichita, Kansas, or his or her agent, shall complain of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas; and, furthermore, the City Attorney of the City of Wichita, Kansas, or any of his or her authorized assistants, shall not refer any said complaint to any other authority for prosecution. No convictions pursuant [sic] Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement agency.

(e) Should the State of Kansas enact lesser penalties than that set forth in Subsections (b) and (c) of this Chapter for possession of cannabis sativa L., or otherwise known as marijuana, as described therein, or possession of drug paraphernalia, as further described therein, then these Subsections, or relevant portions thereof, shall be null and void. The invalidity or unenforceability of any provisions of Subsections (b) and (c) shall not affect the validity or enforceability of other provisions thereof, which shall remain in full force and effect.

(f) In addition to any other sentence authorized by this Chapter, any person convicted of having violated the terms of this Chapter, while under twenty-one (21) years of age, shall be ordered to submit to and complete a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008 and amendments thereto and to pay a fee for such evaluation. If the judge finds that the person is indigent, the fee may be waived.

11. Section 5.26.040 of the Code of the City of Wichita currently provides that the criminal penalty for possession of marijuana is a misdemeanor with a fine of not more than \$2,500 and a jail sentence of not more than one year imprisonment.

12. On March 5, 2015, the Kansas Attorney General issued an opinion concluding that the proposed ordinance was void as it conflicted with a uniform state criminal statute and that the petition failed to comply with the legal requirements of K.S.A. 12-3013 and K.S.A. 25-3601. (Exhibit B).

13. The Kansas Attorney General on March 5, 2015, also notified the City, that if the proposed ordinance was passed by electors, that his office would initiate legal action to declare the proposed ordinance void as a matter of law.

14. On April 7, 2015, the ordinance was passed by the electors of the City of Wichita.

15. K.S.A. 12-3013 provides that upon approval by the electors, the proposed ordinance shall become effective.

16. K.S.A. 12-3007 requires that any ordinance, prior to becoming effective, be published by the City Clerk.

17. The proposed ordinance has not been published or approved by the Wichita City Council.

18. In order for the proposed ordinance to be implemented by the City Council, Section 5.26.040 would need to be repealed by the Council.

19. While Attorney General Opinions are only advisory in nature and not binding on the City or the court, they are legally persuasive. If the proposed ordinance is found to be "void," implementation and prosecution of offenses under the ordinance would subject the City to claims of unlawful arrest, unlawful detention and malicious prosecution.

20. Any conviction under a "void" ordinance would be void as a matter of law.

21. Pursuant to the Declaratory Judgment Act, K.S.A. 16-1701 et seq., this Court has jurisdiction to determine the validity of the proposed ordinance before any individual is charged or sentenced pursuant to the ordinance or it is formally enacted by the City Council by its publication and the repeal of Section 5.24.060 of the Code of the City of Wichita.

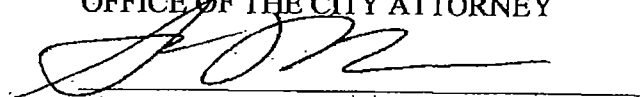
22. The function of a Declaratory Judgment action is to provide a speedy determination of the rights and obligations of the parties.

23. Unless a timely adjudication of the rights of the parties is made by this Court, the parties will expend time and resources, and will ultimately engage in extensive litigation regarding the enforceability of the proposed ordinance passed by the electors.

WHEREFORE, plaintiff prays the Court for an order determining if the ordinance passed by the electors is in conflict with state law, whether it is enforceable by the City and whether the same may be properly enacted by the City of Wichita pursuant to its Home Rule Powers.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY



Sharon L. Dickgrafe, #14071

Interim City Attorney

City Hall - 13th Floor

455 North Main

Wichita, Kansas 67202

(316) 268-4681

[sdickgrafe@wichita.gov](mailto:sdickgrafe@wichita.gov)



**MARIJUANA REFORM INITIATIVE - ICT**

Petition to the Governing Body of the City of Wichita, Kansas

Whereas the public interest of the City of Wichita, Kansas, is best served in reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00); and, the public interest of the City of Wichita, Kansas, is best served if persons subject to complaint of the aforementioned are provided with summons or notice to appear, without arrest, and that no subsequent conviction thereto shall be recorded as a misdemeanor;

Therefore Section 5.26.040 of the Municipal Code of the City of Wichita, Kansas, shall be repealed in its entirety and the substitute provisions set forth in MARIJUANA REFORM INITIATIVE - ICT, as available, shall be adopted by the City of Wichita, Kansas. To such extent that Charter Ordinance No. 122 must be further revised, repealed, amended or otherwise modified in order to implement said initiative, the City Council of the City of Wichita, Kansas, is requested to take such legislative action as may be necessary, reasonable or prudent. The City Council of the City of Wichita, Kansas, is further requested to take such other policy change or legislative action as may be necessary, reasonable or prudent to implement and codify the purpose and intent hereof.

I, the undersigned, a qualified elector of the City of Wichita, Kansas, request that the following proposed ordinance, without alteration, be passed or referred to a vote the electors pursuant to the provisions of Chapter 25-3601 of the Kansas Statutes:

**Shall the following be adopted?**

**AN ORDINANCE REDUCING THE PENALTY FOR FIRST OFFENSE CONVICTION FOR POSSESSION OF THIRTY-TWO (32) GRAMS OR LESS OF CANNABIS SATIVA L., OTHERWISE KNOWN AS MARIJUANA, AND/OR DRUG PARAPHERNALIA RELATED THERETO, BY PERSONS TWENTY-ONE (21) YEARS OR AGE OR OLDER, TO AN INFRACTION WITH A FINE NOT TO EXCEED FIFTY DOLLARS (\$50.00).**

I have personally signed this petition. I am a registered elector of the State of Kansas and of the City of Wichita, Kansas, and my residence address is correctly written after my name.

	DATE	SIGNATURE	PRINTED NAME	PRINTED ADDRESS	CITY
0	01/01/XX	Jane B. Doe	Jane B. Doe	123 S Main, Apt 0	Wichita
1					
2					
3					
4					
5					
6					
7					

State of Kansas )  
County of Sedgwick ) ss:

I am the circulator of this petition and I am qualified to circulate this petition and I personally witnessed the signing of the petition by each person whose name appears thereon. I believe the statements made herein and that each signature appended to the paper is the genuine signature of the person whose name it purports to be.

Signature of Circulator

Circulator's Residence address

Signed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2014, by \_\_\_\_\_

Circulator Print Name

Notary Public

My appointment expires:

Seal

BY

For more information, contact info@mr1-ict.com (316) 737-8811

OCT 15 2014

Exhibit "A"



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT  
ATTORNEY GENERAL

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.AG.KS.GOV

March 5, 2015

ATTORNEY GENERAL OPINION NO. 2015- 4

The Honorable Mark Kahrs  
State Representative, 87th District  
State Capitol, Room 286-N  
300 S.W. 10th Avenue  
Topeka, Kansas 66612

The Honorable Steven R. Brunk  
State Representative, 85th District  
State Capitol, Room 285-N  
300 S.W. 10th Avenue  
Topeka, Kansas 66612

Re: Constitution of the State of Kansas—Corporations—Cities' Powers of Home Rule.

Cities and Municipalities—Ordinances of Cities—Initiative and Referendum Ordinances—Petition for Proposed Ordinances; Requirements; Passage or Election; Form of Ballot Approval, effect; Amendment or Repeal; Publication

Synopsis: A city would exceed the city's home rule powers by adopting an ordinance that is preempted because it conflicts with a uniform state criminal statute. Thus, the ordinance would be void. Cited herein: K.S.A. 12-3013; K.S.A. 2014 Supp. 12-4106; K.S.A. 12-4111; 21-2501a; K.S.A. 2014 Supp. 21-5102; 21-5705; 21-5706; 21-5709; 21-6602; 21-6611; 21-6810; K.S.A. 22-2202; K.S.A. 2014 Supp. 65-4105; Kan. Const. Art. 2, § 17 and Kan. Const. Art 12 § 5; 18 U.S.C. § 922; 27 C.F.R. § 478.11.

\* \* \*

Exhibit "B"

Dear Representatives Kahrs and Brunk:

As State Representatives for the 87<sup>th</sup> and 85<sup>th</sup> Districts, respectively, you ask our opinion whether the proposed amendments to Section 5.26.040 of the Code of the City of Wichita, Kansas, would be preempted by state law because the amendments would conflict with uniform state statutes. In our opinion, the answer is yes.

### ***Background***

K.S.A. 12-3013 prescribes the procedure that city electors may, by petition, initiate to directly propose and enact local legislation independent of the local governing body. If the petition is signed by the requisite number of qualified electors, the governing body must either enact the ordinance without alteration or hold an election. If an election is held and the majority of the electorate votes in favor of the proposed ordinance, the ordinance becomes valid and binding without alteration.<sup>1</sup> Such ordinance shall not be repealed or amended except by a vote of the electors at a subsequent election or by the governing body after passage of 10 years from the effective date.<sup>2</sup> The initiative and referendum process is not available for proposed ordinances that are administrative ordinances, ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments, or ordinances subject to referendum or election under another statute.<sup>3</sup>

Attorney General opinions rely on the facts presented in the opinion request or obtained from interested parties.<sup>4</sup> You provided us a copy of a blank petition that included what appears to be a copy of amendments proposed by the Marijuana Reform Initiative to Section 5.26.040 of the Code of the City of Wichita, Kansas (hereafter, "proposed ordinance"), which is file-stamped October 15, 2014. The petition was filed with the City Clerk on January 7, 2015.<sup>5</sup> The proposed ordinance was not included in or attached to the petition filed with the City Clerk.<sup>6</sup> On January 27, 2015, the City Council adopted

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<sup>1</sup> K.S.A. 12-3013(b) and (c).

<sup>2</sup> K.S.A. 12-3013(c).

<sup>3</sup> K.S.A. 12-3013(e)(1), (2), and (3).

<sup>4</sup> We do not opine on whether the petition and proposed ordinance comply with the requirements of K.S.A. 12-3013 and thus, whether the question may properly be placed on the ballot. However, because the proposed ordinance was not filed with the petition, as required by K.S.A. 12-3013, we are unable to confirm what ordinance language, if any, would be on the ballot. This filing deficiency suggests a threshold procedural infirmity from the facts that are known to us. It also is unclear to us whether the subject matter within the proposed ordinance is a legislative matter that may be proposed by Initiative or whether the process used was legally impermissible for the ordinance proposed. If the proposed ordinance is determined to be administrative, it is not subject to Initiative and referendum pursuant to K.S.A. 12-3013(e)(1). We note that the proposed ordinance contains elements that appear to be administrative in nature, such as the provisions regarding the reporting and handling of criminal justice information.

<sup>5</sup> *Minutes*, City of Wichita City Council Meeting, January 27, 2015.

<sup>6</sup> *Id.*

Ordinance No. 49-936 to submit the ballot question to a vote of the citizens of the City of Wichita.<sup>7</sup>

The language presented to us from the petition circulated by the Marijuana Reform Initiative and from Ordinance No. 49-936 adopted by the City is as follows:

**SHALL THE FOLLOWING BE ADOPTED?**

An ordinance reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of criminal sativa I, otherwise known as marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00).

YES \_\_\_\_\_ NO \_\_\_\_\_

The language from the proposed ordinance is as follows:<sup>8</sup>

**SECTION 5.26.040 OF THE MUNICIPAL CODE OF THE CITY OF WICHITA, KANSAS, SHALL BE REPEALED IN ITS ENTIRETY AND THE SUBSTITUTE PROVISIONS SET FORTH BELOW SHALL BE ADOPTED.**

(a) Except as provided at Subsections (b) and (c) herein, a violation of the provisions of this Chapter is a misdemeanor and, upon conviction, the sentence shall be a fine not to exceed two thousand five hundred dollars (\$2,500.00), and/or imprisonment of up to twelve (12) months in the Sedgwick County Jail.

(b) A conviction of any person twenty-one (21) years of age or older of Section 5.26.010 for possession of one [sic] (32) grams or less of cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], for the first offense, is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or

<sup>7</sup> *Id.*

<sup>8</sup> This language was provided to us with the opinion request, and we have compared it with language provided to us at our request by the City of Wichita and also with language posted on the website for the Marijuana Reform Initiative. All three versions appear to be identical; thus, we presume this is the language that is in fact proposed for adoption by Wichita electors. However, we cannot confirm that as a matter of law because no ordinance was filed with the petition as required by K.S.A. 12-3013.

rehabilitative measure, shall be imposed; however, pursuant [sic] Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant [sic] Section 1.06.010 *et seq.*

(c) A conviction of any person twenty-one (21) years of age or older of Section 5.26.030 for possession of drug paraphernalia, as defined by Section 5.25.005(f), for the first offense, involving cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed; however, pursuant [sic] Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant [sic] Section 1.06.010 *et seq.*

(d) The intent of Subsections (b) and (c) of this Chapter is to reduce first offense convictions pursuant [sic] Sections 5.26.010 and 5.26.030 for cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], to be an infraction, and not a misdemeanor. For the purpose of determining whether a conviction is a first or subsequent offense under Subsections (b) and/or (c), any conviction or convictions resulting from the same incident occurring after July 1, 2015, shall constitute a first offense and any subsequent conviction or convictions occurring within one (1) year thereafter shall constitute a subsequent offense. Nothing herein shall be construed to restrict law enforcement officers of the City of Wichita, Kansas, to complain of violations of offenses other than Subsections (b) and (c) of this Chapter. No law enforcement officer of the City of Wichita, Kansas, or his or her agent, shall complain of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas; and, furthermore, the City Attorney of the City of Wichita, Kansas, or any of his or her authorized assistants, shall not refer any said complaint to any other authority for prosecution. No convictions pursuant [sic] Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.

(e) Should the State of Kansas enact lesser penalties than that set forth in Subsections (b) and (c) of this Chapter for possession of cannabis sativa L., or otherwise known as marijuana, as described therein, or possession of drug paraphernalia, as further described therein, then these Subsections, or relevant portions thereof, shall be null and void. The invalidity or unenforceability of any provisions of Subsections (b) and (c) shall not affect the validity or enforceability of other provisions thereof, which shall remain in full force and effect.

(f) In addition to any other sentence authorized by this Chapter, any person convicted of having violated the terms of this Chapter, while under twenty-one (21) years of age, shall be ordered to submit to and complete a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008 and amendments thereto and to pay a fee for such evaluation. If the judge finds that the person is indigent, the fee may be waived.

Currently, Section 5.26.040 of the Code of the City of Wichita, Kansas, provides that a conviction for possession of marijuana or of drug paraphernalia related to marijuana is a misdemeanor punishable by a fine not to exceed \$2,500 and/or imprisonment in the county jail for up to 12 months. These crimes and penalties are parallel to those crimes and penalties provided for in state statute.<sup>9</sup>

### ***Preemption***

The principle that cities cannot enact laws that contradict state law is found in the Home Rule Amendment to the Kansas Constitution.<sup>10</sup> The Home Rule Amendment grants cities the power to enact legislation to govern local affairs, "subject only to enactments of the legislature of statewide concern applicable uniformly to all cities [and] to other enactments of the legislature applicable uniformly to all cities . . . ."<sup>11</sup> In addition, the Home Rule Amendment states that city home rule powers "shall be liberally construed for the purpose of giving to cities the largest measure of self-government."<sup>12</sup>

Cities' home rule power is not unlimited. "[H]ome rule power does not authorize cities to act where the state legislature has precluded municipal action by clearly preempting the field with a uniformly applicable enactment."<sup>13</sup> Kansas courts have identified two means by which a state statute may overrule a city's home rule power: (1) if there is a conflict

<sup>9</sup> K.S.A. 2014 Supp. 21-5706 and 21-5709.

<sup>10</sup> Kan. Const. Art. 12, § 5.

<sup>11</sup> Kan. Const. Art. 12, § 5(b).

<sup>12</sup> Kan. Const. Art. 12, § 5(d).

<sup>13</sup> *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, 269 Kan. 670, 673 (2000).

between the local regulation and a state statute; or (2) if the state legislature has preempted the field of regulation.<sup>14</sup>

An "[e]nabling act is uniformly applicable to all cities or counties if it authorizes all cities or counties to perform certain acts. Such statutes are state law and preempt the field of their application without use of preemptive language, unless there are express exceptions in the statutes or unless the statutes pertain to police power regulations."<sup>15</sup> By court-imposed exception to constitutional and statutory home rule, a "[m]unicipality has the right to legislate by ordinary ordinance or resolution *nonconflicting* local police power laws even though there are state laws on the subject uniformly applicable to all municipalities."<sup>16</sup> The issue at the core of your question, therefore, is whether the proposed ordinance, which relates to the city's exercise of its police power, would conflict with state law. If the proposed ordinance would be in conflict with state law, then it is preempted and the city lacks power or authority to enact it.

A local ordinance is conflict preempted where it permits what the state statute forbids or prohibits what the statute authorizes.<sup>17</sup> The Kansas Supreme Court has found there is no conflict between the provisions of a local ordinance and state law when the ordinance is parallel or identical to the state law,<sup>18</sup> the ordinance supplements or adds to the state law,<sup>19</sup> or the ordinance provides for standards of performance that are higher than those set by state law.<sup>20</sup> In contrast, the Supreme Court has held that a city cannot classify a crime as a misdemeanor in an ordinance when the Kansas Legislature has classified the crime in state statute as a felony.<sup>21</sup>

What is apparent from these cases is that uniform state law establishes a *minimum standard* that must be met by the local ordinance if the city intends to use its police power to exercise concurrent jurisdiction with the state. Where a city ordinance provides a standard below the minimum standard set by the state, the ordinance is in conflict with the state law and is invalid.

Drug laws, statutory powers and duties of law enforcement officers and criminal information reporting statutes are plainly enactments of the legislature that are of

<sup>14</sup> *State ex rel. Kline v. Bd. of Comm'rs of Unified Gov't of Wyandotte County/Kansas City*, 277 Kan. 516, 526-27 (2004), citing *City of Junction City v. Lee*, 216 Kan. 495, 498-499 (1975) (superseded by statute as stated in *Blevins v. Hiebert*, 247 Kan. 1 (1990)).

<sup>15</sup> *Blevins v. Hiebert*, 247 Kan. 1, 11 (1990).

<sup>16</sup> 247 Kan. at 8 (emphasis added).

<sup>17</sup> 216 Kan. at Syl. ¶ 6.

<sup>18</sup> *City of Garden City v. Miller*, 181 Kan. 360 (1957).

<sup>19</sup> *Hutchinson Human Relations Commission v. Midland Credit Management, Inc.*, 213 Kan. 308 (1973).

<sup>20</sup> *Leavenworth Club Owners Association v. Atchison*, 208 Kan. 318 (1971).

<sup>21</sup> See *State v. Jenkins*, 295 Kan. 431, 442 (2012) (a city cannot classify third and subsequent offenses for theft as a misdemeanor where a state statute classifies such offenses as a felony) and *City of Junction City v. Cadoret*, 263 Kan. 164, 170 (1997) (a city cannot classify third and subsequent offenses for driving under the influence as a misdemeanor where a state statute classifies such offenses as a felony).

statewide concern and that apply uniformly to all cities.<sup>22</sup> In our view, the proposed ordinance would impermissibly conflict with uniform state law as discussed below.

### *I. Possession of Marijuana*

K.S.A. 2014 Supp. 21-5706(b)(3) provides that it is unlawful for any person to possess a controlled substance, including "any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105." Marijuana is such a controlled substance.<sup>23</sup> The first conviction for possession of marijuana is a class A nonperson misdemeanor offense.<sup>24</sup> A class A nonperson misdemeanor is punishable by a fine not to exceed \$2,500<sup>25</sup> and/or imprisonment in the county jail for up to 12 months.<sup>26</sup>

In its current form, Section 5.26.040(a) is parallel to K.S.A. 2014 Supp. 21-5706 and thus is valid. However, Section (b) of the proposed ordinance would eliminate the parallel between state law and the city ordinance by decreasing the penalty for the first offense conviction for possession of 32 grams or less of *Cannabis sativa* L. by any person 21 years or older and by changing the penalty from a misdemeanor to "an infraction" punishable only by "a fine not to exceed fifty dollars (\$50.00)," an amount less than what is authorized by state statute. Section (b) of the proposed ordinance would conflict with state law in at least four ways.

First, the proposed ordinance impermissibly attempts to lower the penalty established by state law for certain illegal conduct. The Kansas Supreme Court in *State v. Jenkins*<sup>27</sup> held that cities can adopt an ordinance relating to a local police power, even though there is a state law on the subject uniformly applicable to all municipalities, as long as the ordinance does not conflict with the state statute. In *Jenkins*, the Court found a conflict when a city ordinance classified the offense as a misdemeanor, but the legislature had classified the crime as a felony.<sup>28</sup>

The permissible classifications of crimes are established by state law. Under the Kansas Criminal Code, a crime is defined as:

An act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine, is

<sup>22</sup> See Kan. Const. Art. 2, § 17 which provides that all laws of a general nature shall have a uniform operation throughout the state; *Blevins v. Hiebert*, 247 Kan. 1, 11 (1990).

<sup>23</sup> K.S.A. 2014 Supp. 65-4105(d)(16).

<sup>24</sup> K.S.A. 2014 Supp. 21-5706(c)(2)(A).

<sup>25</sup> K.S.A. 2014 Supp. 21-6611(b)(1).

<sup>26</sup> K.S.A. 2014 Supp. 21-6602(a)(1).

<sup>27</sup> 295 Kan. 432, 442 (2012).

<sup>28</sup> Whether the *Jenkins* opinion relied on the fact that the city did not have jurisdiction over the felony offense is irrelevant here. The municipal court has jurisdiction to hear and determine cases involving violations of ordinances of a city, including concurrent jurisdiction over felony possession of marijuana. See K.S.A. 2014 Supp. 12-4104.



authorized or, in the case of a traffic infraction or a cigarette or tobacco infraction, a fine is authorized. Crimes are classified as felonies, misdemeanors, traffic infractions and cigarette or tobacco infractions.<sup>28</sup>

The criminal code does not recognize the general term "infraction" as a classification, only "traffic infraction" and "tobacco infraction." Thus, the conflict between the proposed ordinance and state law is even more acute than the conflict found impermissible by the Supreme Court in *Jenkins*. In *Jenkins*, the Supreme Court rejected a city's attempt to reclassify certain criminal conduct from one category recognized by state law, a felony, to a lesser category recognized by state law, a misdemeanor. But here, not only would the proposed ordinance recategorize certain criminal conduct to a lesser category, but the lesser category it proposes – "an infraction" – is not recognized by state law. Because Kansas does not authorize the classification of "an infraction" generally, nor specifically for the crime of possession of marijuana, the proposed amendment to Section 5.26.040 would conflict with Kansas law.

That conclusion is buttressed because the proposed reclassification would reduce the available penalty by eliminating the potential for jail time and lowering the amount of the fine to less than what is established by state law. The elimination of jail time as a sentencing option and the reduction in the potential fine would not supplement or add to the state law but instead would lower the standard established by state law. Thus, we believe that where the legislature classified certain criminal acts as felonies or misdemeanors, a city ordinance conflicts with state law when it attempts to reclassify the same acts to be infractions subject to lesser penalties.

Further, because the proposed ordinance does not treat a first offense conviction as a misdemeanor, it would have the effect in many cases of indirectly reclassifying conduct that currently is a felony under state law – subsequent convictions for possession of marijuana – as a lesser offense. This effect results from the requirement in the proposed ordinance that a first conviction for marijuana possession may be counted as a prior conviction in fewer circumstances than under state law. The effect is that at least one additional conviction, beyond the requirements of state law, would be necessary before an individual could be convicted of felony possession of marijuana. In this manner, the reclassification in the proposed ordinance undermines the state felony statute by causing certain repeat conduct that currently is punishable as a felony to instead be punishable only as a lesser offense, even under state law. This provision is not parallel to but instead is below the standard set by the state, and thus there is a conflict that precludes municipal action.

Second, to the extent subsection (d) of the proposed ordinance attempts to create a one-year decay period that would redefine a second conviction one year or more after the first offense conviction so that it is counted only as another first conviction, such attempt would be impermissible as conflicting with K.S.A. 2014 Supp. 21-6810(d)(3)(A). State law recognizes no such decay factor for prior convictions. Because the provision

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<sup>28</sup> K.S.A. 2014 Supp. 21-5102.

would make it possible to have numerous "first convictions" for possession of marijuana, as long as each conviction is spaced more than one year apart from the prior conviction, an individual's criminal history potentially would never accumulate. This would undermine the provisions of state law that provide for increasing penalties for repeat offenses for the crime of possession of marijuana, and ultimately would undermine felony provisions of state law that would attach (without the decay period) to subsequent convictions for possession of marijuana, regardless of the timing.

Third, the ordinance proposes to establish an amount of marijuana as the demarcation for classification as an "infraction" rather than a misdemeanor, effectively adding an additional factual element the prosecution must prove. Currently, possession of a specific amount of marijuana is not required to be alleged or proven by the prosecution because it is not an element of the crime in either the current ordinance or in state law. Whereas possession of a small amount of marijuana is a misdemeanor under state law and must be considered and scored in criminal history pursuant to K.S.A. 2014 Supp. 21-6810(d)(5), the proposed ordinance would reclassify the possession of that same amount of marijuana, up to 32 grams, as an infraction.

The statute and the ordinance would no longer be parallel, and the ordinance would conflict with state law since the ordinance is seeking to remove a crime that must be considered and scored for criminal history purposes. It would undermine the city's jurisdiction over the prosecution of felony possession of marijuana under K.S.A. 2015 Supp. 12-4104(a)(5) or the state's prosecution for the same under K.S.A. 2014 Supp. 21-5706(b)(3) because the criminal history score would be inaccurate in the event of any subsequent convictions for possession of marijuana.

Fourth, the ordinance proposes to impose an age restriction by allowing persons 21 years or older to receive a more lenient sentence. Under state law, adult convictions do not require a specific age to be alleged or proven in a prosecution for possession of marijuana. The addition of this age factor appears to be another way to prevent the attachment of criminal history as stated above. Again, the statute and ordinance would no longer be parallel, and the ordinance would allow conduct that state law prohibits and undermine the state system of collecting accurate criminal history in order to enhance the penalties for recidivist marijuana possession convictions accordingly.

In our opinion, any one or more of the above conflicts between the proposed ordinance and state law would result in conflict preemption of the proposed ordinance, rendering it void.

## *II. Possession of Drug Paraphernalia related to Marijuana*

K.S.A. 2014 Supp. 21-5709(b)(2) makes it unlawful for any person to use or possess with intent to use any drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." The first

and subsequent convictions of possession of paraphernalia are class A nonperson misdemeanor offenses.<sup>30</sup>

In its current form, Section 5.26.040(a) of the Code of the City of Wichita, Kansas, is parallel to K.S.A. 2014 Supp. 21-5709 and thus is valid. However, Section (c) of the proposed ordinance would eliminate the parallel between state law and the city ordinance by decreasing the penalty for the first offense conviction for possession of drug paraphernalia involving *Cannabis sativa L.* by any person 21 years or older. If the proposed ordinance were adopted by the electors in Wichita, Section 5.26.040 would be amended so that a first conviction of the offense as redefined by the proposed ordinance would be "an infraction" punishable by "a fine not to exceed fifty dollars (\$50.00)." Section (c) of the ordinance would conflict with state law in at least two ways.

First, the proposed ordinance impermissibly attempts to lower the penalty established by state law from a class A misdemeanor to an infraction. In accord with the analysis above, the Kansas Criminal Code does not recognize the term "infraction" as a classification in this context. An ordinance that purports to lower the classification of a crime below that set by the state law is in conflict with state law and is void.

Additionally, such classification conflicts with state law because it lessens the potential penalty from the standard that is provided for by state law.

Second, the proposed ordinance singles out persons 21 years or older to receive a lesser penalty for a conviction, which would render the ordinance no longer parallel to state law. As stated above, a city ordinance cannot classify the same acts to be a lesser offense than provided for in state law without causing a conflict. This proposed reclassification appears to be another way to prevent attachment of criminal history which is required to be considered and scored pursuant to K.S.A. 2014 Supp. 21-6810(d)(5).

Either one of the above conflicts between the proposed ordinance and state law would result in conflict preemption of the proposed ordinance, rendering it void.

### *III. Duties of Law Enforcement Officers to Enforce State Law*

Section (d) of the proposed ordinance proposes to prohibit City of Wichita law enforcement officers from complaining "of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas." That *de facto* gag rule for Wichita police officers, if enacted, would directly conflict with the duties of all Kansas law enforcement officers, including those employed by the City of Wichita, as set forth in state statute.

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<sup>30</sup> K.S.A. 2014 Supp. 21-5709(e)(3).

K.S.A. 12-4111 provides:

The governing body [of a city] may employ law enforcement officers who shall have power to execute all process issued by any municipal judge within the state and delivered to him or her for that purpose, to detain persons, to place them in custody, and to arrest them, pursuant to the terms of this act.

*The powers of law enforcement officers with respect to the code of criminal procedure shall not be reduced by this code.*<sup>31</sup>

The very definition of a "law enforcement officer" under Kansas law is, *inter alia*, a person who "make[s] arrests for violation of the laws of the state of Kansas . . . ." A city ordinance that purports to prohibit a "law enforcement officer" from enforcing state law would be in clear conflict with the K.S.A. 22-2202(13), which defines "law enforcement officer" as follows:

"Law enforcement officer" means any person who by virtue of office or public employment is *vested by law with a duty to maintain public order or to make arrests for violation of the laws of the state of Kansas* or ordinances of any municipality thereof or with a duty to maintain or assert custody or supervision over persons accused or convicted of crime, and includes court services officers, parole officers and directors, security personnel and keepers of correctional institutions, jails or other institutions for the detention of persons accused or convicted of crime, while acting within the scope of their authority.<sup>32</sup>

Kansas law enforcement officers, including those employed by the City of Wichita, have a legal duty to enforce state law, which necessarily includes the authority to present cases for prosecution when appropriate to state authorities. A local ordinance, such as the proposed ordinance, that proposes to direct law enforcement officers to abandon that statutory duty is in conflict with state law and void.

#### *IV. Offense Recording and Reporting by City Police*

Section (d) of the proposed ordinance also would prohibit City of Wichita law enforcement officers from recording a misdemeanor for a conviction of section (b) or (c) with any state or federal law enforcement reporting agency.

An ordinance which purports to prohibit a law enforcement officer from recording or reporting a misdemeanor for a conviction of section (b) or (c) of the proposed ordinance

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<sup>31</sup> Emphasis added.

<sup>32</sup> Emphasis added.

to any state or federal law enforcement reporting agency would be in clear conflict with K.S.A 21-2501a which provides:

(a) All law enforcement agencies having responsibility for law enforcement in any political subdivision of this state, on forms approved by the attorney general, shall maintain a permanent record of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions.

(b) All law enforcement agencies having the responsibility of maintaining a permanent record of offenses shall file with the Kansas bureau of investigation, on a form approved by the attorney general, a report on each offense for which a permanent record is required within 72 hours after such offense is reported or known to have been committed.

By prohibiting City of Wichita law enforcement officers, and/or the Wichita Police Department, from fulfilling statutory obligations to report crimes committed in the city, the proposed ordinance would undermine the purpose of the state statute described above, which is to ensure the accurate compilation of criminal justice information in Kansas. The resulting inaccuracy injected into criminal history record information because of the reporting ban would cause other significant problems in addition to future sentencing inaccuracies. We do not attempt to discern them all here, but one example would be the effect on prosecutions under 18 U.S.C. § 922(g)(3), the federal law prohibiting certain marijuana users from possession of any firearms or ammunition.<sup>33</sup>

The proposed ordinance would conflict with and undermine state law and, thus, would be void.

#### *V. Reporting of Offenses by Municipal Judge*

Additionally, the municipal judge is under a separate duty, pursuant to K.S.A. 12-4106(e), to ensure that "information concerning dispositions of city ordinance violations that result in convictions comparable to convictions for offenses under Kansas criminal statutes is forwarded to the Kansas bureau of investigation central repository. This information shall be transmitted, on a form or in a format approved by the attorney general, within 30 days of final disposition."

<sup>33</sup> 18 U.S.C. § 922(g)(3) provides, "It shall be unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." See also 27 C.F.R. § 478.11, which describes the meaning of "unlawful user of or addicted to any controlled substance."

Subsection (d) of the proposed ordinance states, in pertinent part:

No convictions pursuant [sic] Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.

The proposed ordinance would improperly redefine conduct made criminal by state law so that it is no longer "comparable to convictions for offenses under Kansas criminal statutes." In so doing, it would undermine the purpose of the state statutory system of reporting, which is to ensure the accurate compilation of criminal justice information in Kansas. A city ordinance that purports to prohibit, either directly or by such redefinition, a municipal judge from making a report as required by K.S.A. 2014 Supp. 12-4106(e) would be in clear conflict with the state law and would be void.

### **Conclusion**

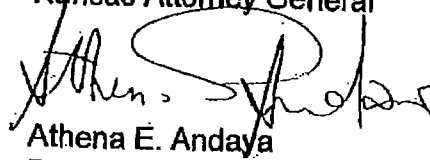
Based upon the above analysis, we conclude that a court would find the proposed ordinance void because it would conflict with uniform state laws in numerous ways. In our opinion, even if the ordinance has been properly placed upon the April ballot – and we are unsure that it has been<sup>34</sup> – a public vote to adopt it would have no legal force or effect.

Sincerely,



Derek Schmidt

Kansas Attorney General



Athena E. Andaya

Deputy Attorney General

DS:AA:sb

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<sup>34</sup> See footnote 4 above.

IN THE SUPREME COURT OF KANSAS

RECEIVED

APR - 9 2015

HEATHER L. SMITH  
CLERK OF APPELLATE COURTS

STATE OF KANSAS *ex rel.* DEREK  
SCHMIDT, ATTORNEY GENERAL,

Petitioner,

v.

CITY OF WICHITA,  
A Municipal Corporation,

Respondent.

Original Action No. \_\_\_\_\_

**MEMORANDUM IN SUPPORT OF PETITION IN QUO WARRANTO  
AND MOTION FOR TEMPORARY RESTRAINING ORDER**

The State of Kansas *ex rel.* Derek Schmidt, Attorney General, submits this memorandum in support of its petition in quo warranto and its motion for a temporary restraining order. For the reasons set forth herein, the State requests that quo warranto relief be granted and that it receive such other and further relief as the Court deems just and proper.

**STATEMENT OF FACTS**

The facts are fully laid out in the State's verified petition and are summarized here.

On January 7, 2015, a group known as the Marijuana Reform Initiative filed an initiative petition under K.S.A. 12-3013 with the Wichita City Clerk calling for the adoption of an ordinance that the petition (and later the ballot) summarized as follows:

An ordinance reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of cannabis sativa L, otherwise known as marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00).

(Affidavit of Deputy Attorney General Athena Andaya ("Andaya Affidavit") ¶¶ 2 and 6; Exhibits B and G). The group drafted and circulated a proposed ordinance (the "Wichita

Marijuana Ordinance”) with its petition, but this proposed ordinance was not filed with the city clerk along with the petition. (Andaya Affidavit, ¶¶ 4 and 6; Exhibits E and G).

The Sedgwick County Election Office determined that the petition contained the legally required number of signatures, and the petition was presented to the Wichita City Council on January 27, 2015. (Exhibits F, G, and H). The Wichita City Council voted to place the measure on the ballot for the April 7, 2015, city election. (Exhibits F and I). Like the petition itself, the ballot contained only “a title generally descriptive of the contents” of the proposed ordinance. *See* K.S.A. 12-3013(b); and Exhibit I.

The Wichita Marijuana Ordinance, attached to the Andaya Affidavit as Exhibit C, amends section 5.26.040 of the Code of the City of Wichita in several ways. The existing city code, like state law, makes possession of marijuana and drug paraphernalia a misdemeanor punishable by a fine not to exceed \$2,500 and/or imprisonment in the county jail not to exceed 12 months. Subsection (b) of the Wichita Marijuana Ordinance classifies first time marijuana possession convictions involving 32 or fewer grams of marijuana by a person 21 years of age or older as an “infraction” punishable by a fine not to exceed \$50 and no jail time. Subsection (c) does the same for first time marijuana paraphernalia convictions involving an offender 21 years or older.

Subsection (d) of the Wichita Marijuana Ordinance contains several provisions apparently designed to implement subsections (b) and (c). Among other things, it addresses the meaning of a first offense:

For the purpose of determining whether a conviction is a first or subsequent offense under Subsections (b) and/or (c), any convictions or convictions resulting from the same incident occurring after July 1, 2015, shall constitute a first offense and any subsequent conviction or convictions occurring within one (1) year thereafter shall constitute a subsequent offense.



It also provides:

No law enforcement officer of the City of Wichita, Kansas, or his or her agent, shall complain of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas; and, furthermore, the City Attorney of the City of Wichita, Kansas, or any of his or her authorized assistants, shall not refer any said complaint to any other authority for prosecution. No convictions pursuant Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.

On March 5, 2015, Attorney General Derek Schmidt issued Attorney General Opinion No. 2015-4, concluding that the proposed Wichita Marijuana Ordinance conflicted with uniform state law and would therefore be null and void if adopted. (Exhibit J). Attorney General Schmidt sent a copy of the opinion to Interim City Attorney and Director of Law Sharon Dickgrafe, along with a letter requesting that the City take necessary steps to prevent the proposal from appearing on the ballot. (Exhibit K). The City Council took no action in response to the letter.

On April 7, 2015, Wichita voters approved the ballot measure purportedly adopting the Wichita Marijuana Ordinance. (Andaya Affidavit, ¶ 10).

## **ARGUMENT**

### **I. This Court Should Exercise Its Original Jurisdiction over this Quo Warranto Proceeding.**

Quo warranto is a well recognized method of challenging a municipal ordinance that violates state law. *See State ex rel. Coleman v. City of Leavenworth*, 75 Kan. 787, 791, 90 P. 237 (1907) (“The law specifically authorizes the use of quo warranto to restrain . . . municipalities from usurping power, and to hold them within the bounds of lawful authority.”); *State ex rel. Vance v. City of Topeka*, 31 Kan. 452, 2 P. 593 (1884) (“[W]henver a municipal corporation usurps any power which might be conferred upon it by the sovereign power of the state, but

which has not been so conferred, such corporation may be ousted from the exercise of such power by a civil action, in the nature of *quo warranto*, in the supreme court.”).

Like mandamus, *quo warranto* “is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business, notwithstanding the fact that there exists an adequate remedy at law.” *Cf. Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553, 556 (2003) (quoting *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992)). The availability of other forms of relief does not preclude an action in *quo warranto*. *State ex rel. Coleman*, 75 Kan. at 791 (“The state in the exercise of its high prerogative right to see that the laws are observed and enforced chose the remedy of *quo warranto* rather than injunction, punishment for contempt, or other civil or criminal proceedings that might have been employed. It is not to be deprived of a remedy expressly given because another may be available.”).

Article III, § 3, of the Kansas Constitution grants this Court original jurisdiction over proceedings in *quo warranto*. This jurisdiction is concurrent with the district courts, and Kansas Supreme Court Rule 9.01 provides that the Court ordinarily will not exercise original jurisdiction when relief is available in the district court. In this case, the Court should exercise its original jurisdiction for at least three reasons.

First, there is no need for fact finding by a district judge or by a commissioner as authorized by Supreme Court Rule 9.01(d). The relevant facts are not in dispute, as demonstrated by the City of Wichita’s Petition for Declaratory Judgment in *City of Wichita v. Bradley*, 15-CV-0910 (18<sup>th</sup> Judicial District, filed April 8, 2015) (Exhibit L), and are adequately established by the sworn affidavit submitted with the State’s petition and the supporting documentary evidence. Resolution of this matter requires purely legal determinations. Thus, commencing this action in

the district court would not assist to perfect the issues presented by this litigation but would instead merely prolong the uncertainty caused by the legal ambiguity surrounding the Wichita Marijuana Ordinance to the detriment of the City, the State, law enforcement officers, municipal judges, criminal defendants, and the public generally. That delay would result from the likelihood of an appeal, likely to this Court, of any district court decision.

Second, this case presents an issue of significant public concern. *See State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 52, 687 P.2d 622 (1984) (“This court may properly entertain this action in quo warranto and mandamus if it decides the issue is of sufficient public concern.”); *cf. Manhattan Buildings, Inc. v. Hurley*, 231 Kan. 20, 25-27, 643 P.2d 87 (1982) (the Court may exercise its original jurisdiction over a petition for a writ of mandamus that presents an issue of great public importance or concern). Citizens of Kansas have a compelling interest in maintaining the uniformity of state criminal law throughout the State and in preventing local jurisdictions from adopting ordinances that conflict with, and undermine, state criminal statutes. Citizens of Wichita have a significant interest in whether their wishes as expressed at the ballot box will be carried out in the form of a city ordinance or whether their opinions must instead be addressed to the Legislature. Provisions of the ordinance also raise important questions about the duty of law enforcement officers to enforce state law and the ability of cities to interfere with these duties. And the State has a strong interest in obtaining accurate and reliable data on criminal offenses occurring in the State, an interest that is impaired by provisions of the ordinance that prevent the reporting of marijuana and drug paraphernalia conviction information to the Kansas Bureau of Investigation. All of these important interests are magnified by the fact this dispute arises in the State’s most populous city, affects the State’s

largest local police department, and involves the municipal court with the highest volume of cases in the State.

Finally, an original action in this Court is appropriate given the need for an expeditious and authoritative ruling on these important legal issues. *See State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 265 Kan. 779, 786-87 (1998) (exercising original jurisdiction over a quo warranto petition when the State asserted “the need for an early, immediate, and final resolution by [the] court of the important legal issues presented”). This Court “has often exercised its original jurisdiction in mandamus to provide a speedy adjudication of issues of law affecting public officials.” *Board of County Comm’rs of Sedgwick County v. Noone*, 235 Kan. 777, 780, 682 P.2d 1303 (1984); *see also Stephens v. Van Arsdale*, 227 Kan. 676, 683, 608 P.2d 972 (1980) (exercising original jurisdiction to provide “an expeditious, authoritative interpretation of the law for the guidance of public officials in the administration of the public business”). Similar considerations should guide this Court in exercising its original jurisdiction over this proceeding in quo warranto.

In the absence of a speedy and authoritative order from this Court, there will be prolonged confusion about whether certain marijuana offenses occurring within the City of Wichita are “infractions” punishable by a maximum \$50 fine or more serious offenses under state law. This uncertainty will disrupt the operations of Wichita police officers and municipal prosecutors, as well as other law enforcement officers and prosecutors who may need to step in to ensure that state law is being enforced. In the meantime, marijuana offenders in Wichita may be prosecuted and convicted under an invalid criminal ordinance, with detrimental effects not only to them but also possibly to the City of Wichita. Wichita police officers will be left in the difficult situation of trying to determine whether they should comply with their legal duties under

state law or follow a conflicting municipal ordinance. And any delay in resolving these issues will disrupt the collection of accurate and reliable data on marijuana offenses in the State.

Given the need to quickly resolve these important issues and the existence of a factual record sufficient to make these purely legal determinations, the State of Kansas respectfully requests that this Court exercise its original jurisdiction over this action.

## **II. Quo Warranto Relief Should Be Granted Because the Wichita Marijuana Ordinance Is Preempted by Uniform State Law.**

The State's request for quo warranto relief should be granted, and the Wichita Marijuana Ordinance declared null and void, because the ordinance exceeds the City of Wichita's legal authority. Article XII, § 5, of the Kansas Constitution, commonly referred to as "The Home Rule Amendment," grants cities general authority to determine their local affairs. But this authority is not unlimited. As relevant here, cities may not adopt ordinances that conflict with uniform state law. *See, e.g., State v. Jenkins*, 295 Kan. 431, 442, 284 P.3d 1037 (2012); *City of Junction City v. Lee*, 216 Kan. 495, 499, 532 P.2d 1292 (1975).

As long as the Legislature has not preempted the field with a uniformly applicable enactment, cities may adopt ordinances identical or parallel to state law, that supplement or add to state law, or that provide standards higher than state law. *See Lee*, 216 Kan. at 501; *Hutchinson Human Relations Comm'n v. Midland Credit Mgmt., Inc.*, 213 Kan. 308, 517 P.2d 158 (1973); *Leavenworth Club Owners Ass'n v. Atchison*, 208 Kan. 318, 492 P.2d 183 (1971). But cities may not adopt ordinances that are inconsistent with uniformly applicable state law by setting lower or less restrictive standards. *See Jenkins*, 295 Kan. at 442; *City of Junction City v. Cadoret*, 263 Kan. 164, 170, 946 P.2d 1356 (1997). In other words, uniform state law establishes a minimum standard that must be met by any local ordinance if a city intends to exercise concurrent jurisdiction with the State, and an ordinance that would undermine or weaken the

standard set by uniform state law is beyond the power of a city to enact. “The test is whether local law permits an activity prohibited by state law or whether it prohibits an activity authorized by state law; if so, there is a conflict.” *Steffes v. City of Lawrence*, 284 Kan. 380, 386, 160 P.3d 843, 848 (2007) (citation omitted).

This principle is demonstrated by this Court’s holdings in *State v. Jenkins*, 295 Kan. 431 (2012), and *City of Junction City v. Cadoret*, 263 Kan. 164 (1997), which are directly on point and control here. In both cases, municipal ordinances classified certain offenses as misdemeanors when these offenses were classified as felonies under state law. *See Jenkins*, 295 Kan. at 442 (thefts of property valued at less than \$1,000 by a person previously convicted of two or more thefts); *Cadoret*, 263 Kan. at 168 (third and subsequent DUI offenses). Because these ordinances set a standard for punishing particular unlawful conduct below that established by state law, this Court held that the ordinances impermissibly conflicted with state law. *Jenkins*, 295 Kan. at 442; *Cadoret*, 263 Kan. at 170.

Applying these principles here demonstrates that the Wichita Marijuana Ordinance conflicts with uniform state law in the following ways and should therefore be declared null and void.

#### **A. Possession of Marijuana**

The Wichita Marijuana Ordinance purports to alter the penalties for certain instances of marijuana possession. Under state law, the first conviction for possession of marijuana is a class A nonperson misdemeanor offense punishable by a fine not to exceed \$2,500 and/or imprisonment for up to 12 months. *See K.S.A. 2014 Supp. 21-5706(c)(2)(A)*; *K.S.A. 2014 Supp. 21-6611(b)(1)*; and *K.S.A. 2014 Supp. 21-6602(a)(1)*. Although possession of marijuana remains illegal under the Wichita Marijuana Ordinance, certain marijuana possession offenses

are classified as infractions punishable only by a fine not to exceed \$50. The ordinance completely eliminates the possibility of jail time for these offenses and dramatically lowers the maximum fine. By classifying certain marijuana possession offenses as infractions when they are classified as misdemeanors under K.S.A. 2014 Supp. 21-5706(c)(2)(A), the Wichita Marijuana Ordinance conflicts with state law, just as the ordinances in *Jenkins* and *Cadoret* conflicted with state law by classifying certain felony offenses as misdemeanors.

In fact, the Wichita Marijuana Ordinance is even more problematic than the ordinances in *Jenkins* and *Cadoret* in that it actually creates a new classification of crime that does not even exist under state law. K.S.A. 2014 Supp. 21-5102 classifies crimes as felonies, misdemeanors, traffic infractions and cigarette or tobacco infractions. The Wichita Marijuana Ordinance labels certain marijuana possession offenses as “infractions,” but these offenses are not traffic infractions, or cigarette or tobacco infractions. State law does not recognize this general “infraction” classification that the Ordinance purports to create.

The Wichita Marijuana Ordinance also effectively reduces the penalties for a number of subsequent marijuana possession offenses. While a first time marijuana possession offense is a class A misdemeanor under state law, subsequent marijuana possession convictions are drug severity level 5 felonies. *See* K.S.A. 2014 Supp. 21-5706(c)(2)(B). Given the Wichita Marijuana Ordinance’s prohibition on reporting infraction offenses to the State or other authorities, however, other jurisdictions will have no record of these previous infraction offenses. And so if an offender convicted of a marijuana infraction in Wichita is later arrested in some other jurisdiction or by some other authority with no knowledge of the previous infraction, the second offense may end up being classified as a misdemeanor first offense rather than as a drug severity level 5 as required by state law.

Even more troubling, the Wichita Marijuana Ordinance redefines the meaning of a first offense. Subsection (d) of the ordinance provides:

For the purpose of determining whether a conviction is a first or subsequent offense under Subsections (b) and/or (c), any convictions or convictions resulting from the same incident occurring after July 1, 2015, shall constitute a first offense and any subsequent conviction or convictions occurring within one (1) year thereafter shall constitute a subsequent offense.

Under this provision, an offender who already has accumulated multiple marijuana convictions before July 1, 2015, will be treated as a first time offender for a new offense occurring after July 1, 2015. Although such a new marijuana offense is a felony under state law, the ordinance will instead consider it a first time offense and classify it as an infraction punishable by a fine not to exceed \$50. This provision also classifies all offenses occurring after July 1, 2015, as first offenses so long as they occur at least one year apart. In effect, marijuana recidivists could accumulate an unending series of “first offenses” and never become subject to the heightened penalties established by state law for repeat offenders.

Additionally, the reduced penalties under the ordinance are available only to individuals 21 years of age or older who possess 32 or fewer grams of marijuana. Under state law, neither the age of the offender nor the amount of marijuana possessed matters for adult marijuana convictions. By making these factors relevant to whether a particular instance of marijuana possession is an “infraction” or a misdemeanor, the ordinance effectively creates new elements that a Wichita prosecutor would be required to prove to convict an offender of misdemeanor marijuana possession. This too conflicts with state law.

#### **B. Possession of Drug Paraphernalia**

The Wichita Marijuana Ordinance also conflicts with uniform state law in how it addresses drug paraphernalia. Under state law, it is unlawful to use or possess with intent to use



any drug paraphernalia to “(1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or (2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.” K.S.A. 2014 Supp. 21-5709(b). A violation of (1) is “a class A nonperson misdemeanor if the drug paraphernalia was used to cultivate fewer than five marijuana plants.” K.S.A. 2014 Supp. 21-5709(e)(2)(B). A violation of (2) is also a class A nonperson misdemeanor. K.S.A. 2014 Supp. 21-5709(e)(3). As noted above, a class A misdemeanor is punishable by a fine not to exceed \$2,500 and/or up to one year in jail.

The Wichita Marijuana Ordinance, however, makes the first offense for possession of marijuana paraphernalia by a person 21 years or older an infraction punishable only by a fine not to exceed \$50. By reducing the classification of certain paraphernalia offenses to an infraction and by basing the penalty for possession of marijuana paraphernalia on the age of the offender, section (c) of the ordinance conflicts with K.S.A. 21-5709.

### **C. Duties of Law Enforcement Officers**

If sections (b) and (c) of the ordinance, relating to possession of marijuana and possession of marijuana paraphernalia, are invalidated due to the conflicts noted above, the entirety of section (d) should also be invalidated because its sole purpose is to implement those sections. Even if sections (b) and (c) were within the City’s authority, however, portions of section (d) should be declared null and void.

Among other things, section (d) of the ordinance impermissibly creates a “gag rule” for Wichita police officers by providing that “[n]o law enforcement officer of the City of Wichita, Kansas, or his or her agent, shall complain of violations of [subsections (b) and (c) of the ordinance] to any other authority except the City Attorney of the City of Wichita, Kansas.”

Kansas law enforcement officers have a legal duty to enforce state law, which necessarily includes the responsibility to present offenses they uncover to state authorities for prosecution when appropriate. By definition, a “law enforcement officer” is, among other things, a person “vested by law with a duty to . . . make arrests for violation of the laws of the state of Kansas.” K.S.A. 22-2202(13). Although the Code for Municipal Courts authorizes municipalities to employ law enforcement officers, it also states that the “powers of law enforcement officers with the respect to the code of criminal procedure shall not be reduced by this code.” K.S.A. 12-4111. The ordinance’s “gag rule,” which directs city law enforcement officers to ignore their statutory duties, conflicts with uniform state law.

If the Wichita Marijuana Ordinance were able effectively to gag Wichita police officers as it purports to do, it would lead to an absurd result: the criminal liability of certain drug offenders caught within the City of Wichita would turn, in part, upon what law enforcement officer effectuated their arrest rather than upon what law (or laws) the offender violated. For example, imagine a (truly) first-time drug offender whose conduct violates both the “infraction” provisions of the Wichita Marijuana Ordinance and state criminal law. If arrested by a Wichita police officer, the offender’s maximum liability would be a \$50 fine imposed by the municipal court. But if the offender is arrested by some other law enforcement officer (such as a Sedgwick County Sheriff’s deputy, a Highway Patrol trooper, or a Kansas Bureau of Investigation agent), the offender would face a fine up to \$2,500, a year in the county jail, or both as ordered by the district court. Avoiding this sort of absurd result is precisely why the Legislature enacted uniform state criminal laws that preempt the Wichita Marijuana Ordinance.

#### **D. Offense Recording and Reporting**

Finally, the Wichita Marijuana Ordinance conflicts with uniform state law by preventing

the recording and reporting of certain marijuana offenses. Section (d) of the ordinance provides that “[n]o convictions pursuant [to] Subsections (b) and/or (c) [of the ordinance] shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.”

This provision is inconsistent with K.S.A. 21-2501a, which provides:

(a) All law enforcement agencies having responsibility for law enforcement in any political subdivision of this state, on forms approved by the attorney general, shall maintain a permanent record of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions.

(b) All law enforcement agencies having the responsibility of maintaining a permanent record of offenses shall file with the Kansas bureau of investigation, on a form approved by the attorney general, a report on each offense for which a permanent record is required within 72 hours after such offense is reported or known to have been committed.

Because it purports to prohibit law enforcement officers employed by the Wichita Police Department from reporting marijuana offenses as required by K.S.A. 21-2501a, the Wichita Marijuana Ordinance conflicts with state law.

The ordinance’s restrictions on offense reporting also conflict with the statutory duty of municipal judges under K.S.A. 2014 Supp. 12-4106(e) to ensure that “information concerning dispositions of city ordinance violations that result in convictions comparable to convictions for offenses under Kansas criminal statutes is forwarded to the Kansas bureau of investigation central repository.” The Wichita Marijuana Ordinance’s provision that “[n]o convictions pursuant [to] Subsections (b) and/or (c) [of the ordinance] shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency” would prevent municipal judges from reporting convictions as required by K.S.A. 2014 Supp. 12-4106.

Because the Wichita Marijuana Ordinance conflicts in numerous ways with uniform state statutes, undermining the purposes and effectiveness of those statutes, this Court should grant quo warranto relief declaring the ordinance and the vote to adopt it null and void.

**III. Even If the Wichita Marijuana Ordinance Were Not Preempted, Quo Warranto Relief Should Be Granted Because the Ordinance Was Not Adopted in Accordance with State Law.**

If this Court were to conclude that the Wichita Marijuana Ordinance, or any part thereof, is not preempted by uniform state law, the Court should nevertheless grant quo warranto relief voiding the entire ordinance for any one of three additional reasons. First, the Wichita Marijuana Ordinance was not properly adopted under K.S.A. 12-3013(a) because it was not filed with the city clerk along with the initiative petition. Second, the ordinance lacks an ordaining clause as required by K.S.A. 12-3005, thereby rendering it null and void. Third, the ordinance is principally administrative in nature and thus was not a proper subject for adoption by initiative and referendum under K.S.A. 12-3013(e).

**A. The Wichita Marijuana Ordinance Was Not Filed with the City Clerk as Plainly Required by K.S.A. 12-3013(a).**

The Wichita Marijuana Ordinance was purportedly adopted through the initiative process laid out in K.S.A. 12-3013. That process was created by the Legislature, and “the intent of the legislature expressed through the language in the statute governs. When a statute is plain and unambiguous, [courts] do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it.” *State v. Paul*, 285 Kan. 658, 661, 175 P.3d 840, 844 (2008) (quoting *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007)).

Thus, it is fatal to the ordinance at issue here that the circulators of the initiative petition failed to comply with that statute in a critical way. The initiative process authorized by K.S.A. 12-3013(a) requires citizens to submit a “proposed ordinance” to the governing body, along with

a petition. K.S.A. 12-3013(a). The statute clearly states that the proposed “ordinance and petition shall be filed with the city clerk.” *Id.* In this case, the proposed ordinance was not filed with the city clerk or even presented to the City Council. (Andaya Affidavit, ¶¶ 4 and 6; Exhibits E and G). Although the Wichita Marijuana Ordinance apparently was circulated with the petition, only the petition was filed and submitted to the governing body, contrary to the plain language of K.S.A. 12-3013. *Id.*

This is not a trivial defect. K.S.A. 12-3013 does not authorize voters to merely propose an amorphous idea, requiring the City to then draft an ordinance in accordance with what it discerns to be the petitioners’ intent. Instead, the statute is clear that the petitioners must submit a “proposed ordinance” to the governing body by filing it with the city clerk. K.S.A. 12-3013(a). If the petition meets all legal requirements, the governing body must then either adopt the proposed ordinance “without alteration” or submit it to the voters, also “without alteration.” K.S.A. 12-3013(a). If the proposed ordinance is submitted to a vote and a “majority of the qualified electors voting on the proposed ordinance votes in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city.” K.S.A. 12-3013(c). No further action by the City is authorized or required. To the contrary, the governing body is prohibited from amending or repealing the ordinance for a period of 10 years unless the amendment or repeal is approved by a vote of the electors. K.S.A. 12-3013(c).

The entire statutory process is rendered dysfunctional if, as in this case, a proposed ordinance is not filed along with the petition. Without a proposed ordinance being filed, how does the governing body know what it must adopt or submit to the voters “without alteration,” and how can it ever be determined whether the statutory mandate for action “without alteration” has been met? How could voters researching the proposed question be put on notice as to what,

precisely, they are being asked to adopt? And if the voters approve the proposed ordinance, how does anyone know precisely what becomes law, what precise duties or proscriptions are binding upon citizens, and what the city council is prohibited from amending or repealing for a period of 10 years? As in this case, the ballot itself will often contain only “a title generally descriptive of the contents” of the proposed ordinance. K.S.A. 12-3013(b).

These concerns arising from the absence of any official version of an ordinance are magnified in this case because this ballot’s “title generally descriptive of the contents” omitted highly relevant information about the contents of the Wichita Marijuana Ordinance. The question submitted to the voters read:

SHALL THE FOLLOWING BE ADOPTED?

An ordinance reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of cannabis sativa l, otherwise known as marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00).

(Exhibit I). This question made no mention of the provisions that purport to “gag” city law enforcement officers from reporting conduct that also violates state law, nor of changes prohibiting city police officers and municipal judges from reporting accurate criminal justice information to state (and ultimately federal) authorities, nor of the provisions arbitrarily redefining a “first offense” that ultimately will undermine state felony drug statutes.

The failure to file a proposed ordinance with a petition also raises serious due process concerns, particularly when dealing with an ordinance addressing criminal punishments. It is well-established that “[a] statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process.” *State v. Watson*, 273 Kan. 426, 429, 44 P.3d 357, 359-60 (2002) (quoting *State v. Huffman*, 228 Kan. 186, Syl. ¶ 5, 612 P.2d 630 (1980)). While

due process principles ordinarily are applied to void a statute or ordinance because the words and phrases its contains are impermissibly vague, the same constitutional concerns are even more pronounced when, as here, the very process used to enact the ordinance is so lacking that “persons of common intelligence must necessarily guess” at exactly what language was circulated with the petition, was presented to the City Council to be adopted or put to a public vote, and was voted upon by the electorate. If there is no official record of exactly what proposed text was approved by the voters and “thereupon become[s] a valid and binding ordinance” under K.S.A. 12-3013(c), the law will be too uncertain to serve as the basis of a criminal prosecution. After all, a criminal defendant cannot be convicted based solely on the title of the ordinance as it appears on the ballot. And the city council cannot cure this problem by subsequently passing an ordinance of its own, since the council is prohibited from amending the proposed ordinance adopted by the voters for a period of ten years. Requiring the timely filing of an official version of a proposed ordinance with the city clerk, as plainly required by K.S.A. 12-3013(a), is fundamental to procedural due process. There is no valid reason the Wichita Marijuana Ordinance could not have been filed with the city clerk as plainly required by statute, thus creating specific and enduring notice of its contents for all purposes and for all persons, both before and after the public vote, and there is no reason for this Court to strain due process principles to save it.<sup>1</sup>

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<sup>1</sup> The State has been unable to find the text of the proposed ordinance published anywhere except on the website of the Marijuana Reform Initiative group. *See* [www.mri-ict.com](http://www.mri-ict.com) (last accessed April 8, 2015). Even if the City could establish (as it has not, and cannot, in this case) that the voters were somehow informed of the ordinance’s precise text, that would not excuse the due process problem. In other contexts, this Court has consistently held that when specific and actual notice may be accomplished, due process precludes reliance on a more general method of giving notice. *See, e.g., Bd. of County Commr’s of Reno County v. Akins*, 271 Kan. 192, 21 P.3d 535 (2001) (publication notice of tax foreclosure sale violates due process when specific notice to party is possible); *In Interest of Woodard*, 231 Kan. 544, 646 P.2d 1105 (1982) (due process

Because the Wichita Marijuana Ordinance was never filed with the city clerk, as required by statute and principles of due process, this Court should grant quo warranto relief declaring the ordinance and the vote to adopt it null and void.

**B. The Wichita Marijuana Ordinance Does Not Contain an Ordaining Clause as Required by K.S.A. 12-3005.**

The Wichita Marijuana Ordinance is also facially deficient in that it did not contain an ordaining clause as required by K.S.A. 12-3005. This statute provides: “The style or ordaining clause of all ordinances shall be: ‘Be it ordained by the governing body of the city of \_\_\_\_:’”. The ordinance that was circulated with the petition (but not filed with the city clerk) lacks this language. (Exhibit C).

Kansas courts have not previously addressed the ordaining clause requirement of K.S.A. 12-3005, but Attorney General Opinion No. 89-61 persuasively concluded that the language specified in K.S.A. 12-3005 is mandatory and that the failure to include it in an initiative and referendum ordinance presented to voters pursuant to K.S.A. 12-3013 renders the ordinance void and unenforceable.

As Attorney General Opinion No. 89-61 noted, this Court considered an analogous issue in *State v. Kearns*, 229 Kan. 207, 623 P.2d 507 (1981), which involved a question about the enabling clause for a bill passed by the Legislature. Article II, § 20, of the Kansas Constitution requires that the enacting clause of all bills shall be: “Be it enacted by the Legislature of the State of Kansas:”. In *Kearns*, the Legislature passed a bill that used the word “resolved” rather than “enacted,” and this Court held that the error rendered the resulting Act null and void. The Court rejected an argument that substantial compliance with Article II, § 20, was sufficient, noting that

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requires attempt to locate and notify parent before relying on publication notice in action to sever parental rights). By analogy, this Court should apply that same principle here.



the language of that provision was “clear, unambiguous and incapable of any interpretation other than prescribing mandatory wording for the enactment of a bill into law.” *Kearns*, 229 Kan. at 209.

The same result should follow here. The text of K.S.A. 12-3005 clearly and unambiguously states that municipal ordinances must contain the specified ordaining clause, but the Wichita Marijuana Ordinance lacks this language. In fact, the Wichita Marijuana Ordinance doesn’t even substantially comply with K.S.A. 12-3005. Unlike *Kearns*, where just one incorrect word in the enacting clause proved fatal to the bill, here the *entire* ordaining clause is missing. Just as the language of Article II, § 20, of the Kansas Constitution is “clear, unambiguous and incapable of any interpretation other than prescribing mandatory wording for the enactment of a bill into law,” *Kearns*, 229 Kan. at 209, so it is with the language of K.S.A. 12-3005 as applied to the form of municipal ordinances. There is no valid reason the Wichita Marijuana Ordinance could not have included this language, and this Court should not strain to save it from this defect.

Because the Wichita Marijuana Ordinance fails on its face to comply with the statutory requirements for enacting a valid municipal ordinance, this Court should grant quo warranto relief declaring the ordinance and the vote to adopt it null and void.

**C. The Wichita Marijuana Ordinance is Predominately Administrative, Not Legislative, in Nature and May Not Be Enacted through the Initiative and Referendum Process Authorized by K.S.A. 12-3013.**

The Wichita Marijuana Ordinance should be voided in its entirety and the State granted its requested relief for the reasons set forth above. If, however, this Court determines that any portion of the Wichita Marijuana Ordinance survives the Part II analysis, the ordinance should nonetheless be voided in its entirety because it is principally administrative, not legislative, in nature and thus was not a proper subject for an initiative petition. K.S.A. 12-3013(e) provides

that administrative ordinances may not be adopted through the initiative process. While it is true that “[t]he determination as to whether an ordinance proposed under the initiative and referendum statute is administrative is to be based on the factual situation in each case,” *McAlister v. City of Fairway*, 289 Kan. 391, 399, 212 P.3d 184, 192 (2009),<sup>2</sup> none of the material facts necessary to make such determination in this case are in dispute.

This Court has adopted a “strict construction doctrine” which requires that an ordinance proposed by initiative and referendum must be “quite clearly and fully legislative and not principally executive or administrative.” *McAlister*, 289 Kan. at 402, 404; *see also City of Lawrence v. McArdle*, 214 Kan 862, 870, 522 P.2d 420 (1974) (“[W]e have never adopted a ‘liberal’ view of the matters which should be subject to initiative and referendum, but quite the contrary.”). Determining whether an ordinance is administrative, as opposed to legislative, is not always an easy task, since most ordinances have both administrative and legislative characteristics. *McAlister*, 289 Kan. at 402. The question ultimately comes down to whether “a proposed ordinance’s administrative characteristics predominate enough to exclude it from the initiative and referendum process.” *Id.*

In making this determination, courts consider four guidelines. First, an “ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative.” *Id.* at 403. Second, ordinances “that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative,” while ordinances “that deal with a small segment of an overall policy question generally are administrative.” *Id.* Third,

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<sup>2</sup> In the debate over the Wichita Marijuana Ordinance, some Wichita city council members expressed a belief that K.S.A. 12-3013 required them to put an illegal ordinance on the ballot because the petition had the requisite number of signatures. *See* (Exhibit F). *McAlister* demonstrates that this is false. In that case, the City of Fairway refused to put a proposed ordinance on the ballot, even though it had a sufficient number of signatures, because the City determined that the petition was administrative in nature. This Court upheld the City’s action.

“[d]ecisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of policy.” *Id.* Fourth, “[i]f the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state’s designated agent for local implementation of state policy, the action receives an “administrative” characterization, [and] hence is outside the scope of the initiative and referendum.”” *Id.* at 404. Although all four guidelines must be considered, “it is possible the weight given to any one guideline may be enough under a particular factual situation to decide that a proposed ordinance intrudes too far into a city’s administrative arena.” *Id.* at 405.

A careful review of the Wichita Marijuana Ordinance provisions demonstrates that it is primarily administrative in nature under the four-part test of *McAlister*.

First, the Wichita Marijuana Ordinance merely “executes an existing law”; it does not make new law. The possession of marijuana and drug paraphernalia already are prohibited by both the existing Wichita City Code and state criminal statutes. *See* Code of the City of Wichita, §§ 5.26.010 and 5.26.030; K.S.A. 2014 Supp. 21-5706(b)(3); K.S.A. 2014 Supp. 65-4105(d); and K.S.A. 2014 Supp. 21-5709(b)(2). The new ordinance merely alters (in an impermissible manner, as described in Part II) the manner in which the City administers these existing prohibitions. To implement these changes, the Wichita Marijuana Ordinance also prohibits conduct that is purely administrative in nature—namely, the administrative procedures of Wichita police officers (who would be prohibited from presenting evidence of state law violations to state authorities) and the administrative procedures of the Wichita Police Department and judges of the Wichita Municipal Court (who would be prohibited from reporting

certain criminal justice information to state authorities). Under the first factor, the Wichita Marijuana Ordinance is predominantly administrative in nature.

Second, the Wichita Marijuana Ordinance deals only with a “small segment of an overall policy question.” The Kansas Legislature has established a comprehensive approach to regulating (or proscribing) illegal drugs in the State. *See* the Uniform Controlled Substances Act, K.S.A. 65-4101 *et seq.*, and the controlled substances provisions of the Kansas Criminal Code, K.S.A. 21-5701 *et seq.* The Legislature has authorized municipal authorities to handle the prosecution of only a small portion of this comprehensive framework, namely the prosecution of certain marijuana possession offenses in municipal court. *See* K.S.A. 2014 Supp. 12-4104(a)(5). Given that comprehensive statewide criminal-law framework, the Wichita Municipal Ordinance’s provisions regarding certain first-time marijuana possession and paraphernalia offenses deal only with a small segment of the overall policy question of how Kansas should approach the regulation of marijuana and related drug paraphernalia. Under the second factor, the Wichita Marijuana Ordinance is predominantly administrative in nature.

Third, the factor stating “[d]ecisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of policy,” is least relevant here. To the extent it applies, however, it is noteworthy that the operation of the Wichita Police Department and the Wichita Municipal Court both require “specialized training and experience in municipal government.” The provisions of the Wichita Marijuana Ordinance that prohibit Wichita police officers from referring certain marijuana cases to prosecutors other than the Wichita City Attorney, prohibit city prosecutors from referring these cases to other authorities, and restrain

police officers and municipal judges from reporting marijuana offense data as required by state law interfere with the administrative operations of these entities. Thus, to the extent the third factor applies at all, it weighs in favor of concluding the Wichita Marijuana Ordinance is predominantly administrative in nature.

Fourth, the subject of enforcing criminal prohibitions on marijuana and drug paraphernalia possession “is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state’s designated agent for local implementation of state policy . . . .” This factor is squarely on point and should be controlling in this case. As discussed above, the Legislature has enacted a comprehensive system of criminal law governing drug offenses, including the possession of marijuana and related drug paraphernalia. The Legislature has specifically delegated to local municipalities the authority to prosecute marijuana possession offenses in municipal court as the State’s “designated agent for local implementation of state policy.” *See* K.S.A. 2014 Supp. 12-4104(a)(5). But the Legislature did not delegate any authority to local electors to alter state law. Under the fourth factor, the Wichita Marijuana Ordinance is predominantly—indeed, exclusively—administrative.

Because the *McAlister* guidelines demonstrate the Wichita Marijuana Ordinance to be predominantly administrative, not legislative, in nature, the ordinance was not properly presented or adopted through the initiative and referendum process established by K.S.A. 12-3013. Thus, this Court should grant quo warranto relief declaring the ordinance and the vote to adopt it null and void.

**IV. This Court Should Either Grant *Ex Parte* Relief under Kansas Supreme Court Rule 9.01(c)(2) or Issue a Temporary Restraining Order to Preserve the Status Quo.**

This Court could grant *ex parte* relief under Kansas Supreme Court Rule 9.01(c)(2) given that the State's right to relief is clear and that no valid defense to the Petition can be offered. As the City's own Law Department explained in a memo to the Wichita Mayor and City Council, "Any proposed ordinance establishing penalties for possession of marijuana less than those established by state law would be in conflict with state law" and that any ordinance "found to conflict would state law . . . would be void." (Exhibit G). The other defects discussed above are equally obvious.

In the event the Court desires to call for a response from the City of Wichita, however, the State respectfully requests that the Court preserve the status quo by issuing a temporary restraining order preventing the City of Wichita from publishing, implementing, or enforcing the Marijuana Ordinance. And a temporary restraining order is immediately necessary to preserve the status quo because the Wichita Marijuana Ordinance becomes effective upon its approval by the voters, *see* K.S.A. 12-3013(c), arguably when the election results are certified by the county board of canvassers.<sup>3</sup> In this case, the county board of canvassers is scheduled to meet at 10 a.m. on Monday, April 13, 2015, in accordance with K.S.A. 2014 Supp. 25-3104. (Andaya Affidavit, ¶ 10)

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<sup>3</sup> In its Petition for Declaratory Judgment in *City of Wichita v. Bradley*, 15-CV-0910 (18<sup>th</sup> Judicial District, filed April 8, 2015) (Exhibit L), the City of Wichita states that the ordinance will not become effective until published by the City Clerk as required by K.S.A. 12-3007. But K.S.A. 12-3007 provides that ordinances "shall take effect the day of publication unless a different and later day is stated in the ordinance or *otherwise specified by statute*. (Emphasis added). The effective date of ordinances approved by initiative and referendum is specified by K.S.A. 12-3013(c) ("If a majority of the qualified electors voting on the proposed ordinance votes in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city.").

The absence of express original jurisdiction to issue injunctions does not prevent this Court “from exercising jurisdiction with regard to such matters, where they are mere incidents or auxiliaries necessary for the rightful and proper exercise of the jurisdiction actually conferred upon the Supreme Court by the Constitution and statutes.” *Chicago, K. & W. Rld. Co. v. Comm’rs of Chase Co.*, 42 Kan. 223, 225, 21 P. 1071 (1889). “Inherently the Supreme Court must have the power to protect its own jurisdiction, its own process, its own proceedings, its own orders, and its own judgments; and for this purpose it may, when necessary, prohibit or restrain the performance of any act which might interfere with the proper exercise of its rightful jurisdiction in cases pending before it.” *Id.* There is precedent for this Court entering a temporary restraining order to maintain the status quo during the pendency of an original action in quo warranto and mandamus. *See Wilson v. Sebelius*, 276 Kan. at 88-89, 72 P.3d at 555. A temporary restraining order is appropriate in this case as incidental to the Court’s original jurisdiction over quo warranto proceedings.

Under the traditional test for temporary injunctive relief, a party requesting an injunction must show: (1) a substantial likelihood of success on the merits, (2) that denial of the injunction will result in irreparable injury without an adequate remedy at law, (3) that the threatened injury to the party requesting the injunction outweighs whatever damage the proposed injunction may cause the opposing party, and (4) that the injunction will not be adverse to the public interest. *See Steffes v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843 (2007); *Wichita Wire*, 11 Kan. App. 2d 459, 462, 726 P.2d 287 (1986).

These factors favor the State’s request for a temporary restraining order here. There is a strong likelihood that the State will prevail on the merits, for the reasons discussed above. Allowing the ordinance to take effect will cause irreparable injury to the State by disrupting the

prosecution of state criminal offenses, preventing law enforcement officers from performing their duties under state law, compelling law enforcement officers and municipal judges to choose between violating state law or violating the local ordinance, and interfering with the collection of accurate and reliable offense data and criminal history information. The harm to the City of Wichita from granting a temporary restraining order is minimal in that this relief will merely preserve the status quo until this matter can be resolved, hopefully on an expedited basis, and indeed the City would benefit from temporary injunctive relief that avoids the need for its police officers and municipal judges to choose which law to violate. And granting a temporary restraining order is in the public's interest in that it will prevent prosecutions under an invalid ordinance, eliminate confusion about how certain conduct involving the possession of marijuana and marijuana paraphernalia in Wichita may be punished, and preserve the statewide effect and operation of uniform state laws.

### **CONCLUSION**

The supporters of the Wichita Marijuana Ordinance addressed their request to the wrong body. If the penalties for marijuana or drug paraphernalia possession are to be decreased, this may only be accomplished by the Legislature amending state criminal law. If certain drug convictions within the Wichita city limits are not to be counted for purposes of future criminal history, or if state criminal justice information is to ignore certain convictions in Wichita municipal court, the Legislature, not the City of Wichita, must make it so. If Wichita police officers and municipal judges are to be granted exceptions to the uniform requirements that apply to all other Kansas law enforcement officers and municipal judges, those exceptions must be granted by the Legislature. Under the Kansas Constitution, cities lack the power to enact ordinances that violate uniform state law.



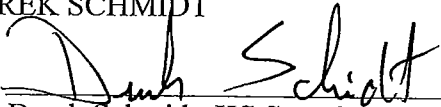
The drafters and circulators of the initiative petition also inexplicably failed to follow the plain statutory requirements of filing the proposed ordinance with the city clerk and including an ordaining clause in the proposed ordinance. And if all these problems were not enough to doom this effort, the contents of the Wichita Marijuana Ordinance are predominantly administrative, not legislative, in nature, thus rendering unavailable the initiative and referendum process followed here.

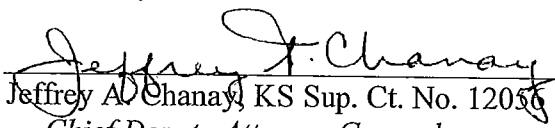
For all of these reasons, the State of Kansas respectfully requests that the Court issue a writ of quo warranto declaring the Wichita Marijuana Ordinance null and void and preventing the City of Wichita from implementing or enforcing the same.

Unless the Court grants *ex parte* relief under Kansas Supreme Court Rule 9.01(c)(2), the State also respectfully requests that the Court preserve the status quo by issuing a temporary restraining order preventing the City of Wichita from publishing, implementing, or enforcing the Wichita Marijuana Ordinance until this matter is resolved.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL  
DEREK SCHMIDT

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*Attorney General*

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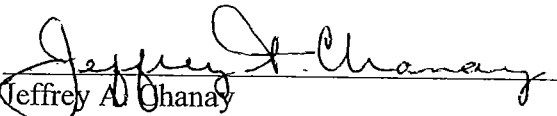
### CERTIFICATE OF SERVICE

This is to certify that on this 9<sup>th</sup> day of April, 2015, a copy of the above and foregoing Memorandum in Support was served by faxing and mailing the same by depositing it in the United States Mail, first class postage prepaid, addressed to:

Karen Sublett  
Wichita City Clerk  
City Hall – 13<sup>th</sup> Floor  
455 N. Main  
Wichita, Kansas 67202  
Fax (316) 858-7776

Sharon L. Dickgrafe  
Interim City Attorney  
City Hall – 13<sup>th</sup> Floor  
455 North Main  
Wichita, Kansas 67202  
Fax (316) 268-4335

A copy will also be served by hand delivery to the above-identified individuals at the addresses listed on the 10<sup>th</sup> day of April, 2015.

  
Jeffrey A. Chanay

RECEIVED

IN THE SUPREME COURT OF KANSAS

APR - 9 2015

HEATHER L. SMITH  
CLERK OF APPELLATE COURTS

STATE OF KANSAS *ex rel.* DEREK )  
SCHMIDT, ATTORNEY GENERAL, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
CITY OF WICHITA, KANSAS, )  
A Municipal Corporation, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Original Action No. \_\_\_\_\_

**MOTION FOR A TEMPORARY RESTRAINING ORDER**

COMES NOW petitioner, the State of Kansas *ex rel.* Derek Schmidt, Attorney General, and respectfully moves this Court for a temporary restraining order restraining the City of Wichita from publishing, implementing, or enforcing the Wichita Marijuana Ordinance, as described in the State's Petition, until this matter is resolved. A memorandum in support of the State's Petition and this Motion is submitted herewith.

As explained in the State's Memorandum, this Court has jurisdiction to issue a temporary restraining order as incidental to the Court's original jurisdiction over this quo warranto proceeding. The factors governing temporary injunctive relief favor the State's request for a temporary restraining order here. There is a strong likelihood that the State will prevail on the merits. Allowing the Wichita Marijuana Ordinance to take effect will cause the State irreparable harm by disrupting the prosecution of state criminal offenses, preventing law enforcement officers from performing their duties under state law, and interfering with the collection of reliable and accurate offense data and criminal history information. The City of Wichita will not

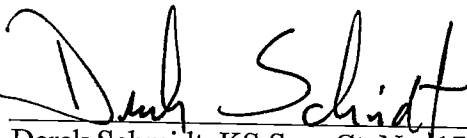
be harmed by preserving the status quo until this matter can be resolved. And granting a temporary restraining order is in the public interest because it will prevent prosecutions under an invalid ordinance, which implicates due process rights for offenders, and avoid creating separate classes of marijuana offenders.

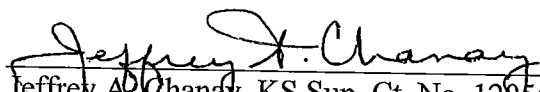
A temporary restraining order is immediately necessary to preserve the status quo because the Wichita Marijuana Ordinance becomes effective upon its approval by the voters, *see* K.S.A. 12-3013(c), arguably when the election results are certified by the county board of canvassers. In this case, the county board of canvassers is scheduled to meet at 10:00 a.m. on Monday, April 13, 2015, in accordance with K.S.A. 2014 Supp. 25-3104. (Andaya Affidavit, ¶ 10). In its Petition for Declaratory Judgment in Sedgwick County Case No. 15-CV-0910 (Exhibit L), the City of Wichita states that the ordinance will not become effective until published by the City Clerk as required by K.S.A. 12-3007. But K.S.A. 12-3007 provides that ordinances “shall take effect the day of publication unless a different and later day is stated in the ordinance or *otherwise specified by statute*. (Emphasis added). The effective date of ordinances approved by initiative and referendum is specified by K.S.A. 12-3013(c) (“If a majority of the qualified electors voting on the proposed ordinance votes in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city.”).

For the reasons set forth in the State’s Memorandum in Support, the State of Kansas *ex rel.* Derek Schmidt, Attorney General, respectfully requests that this Motion for a Temporary Restraining Order be granted.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL  
DEREK SCHMIDT

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*Attorney General*

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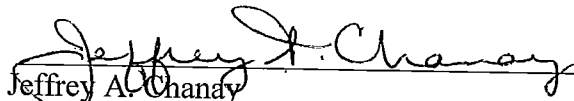
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Jeffrey A. Chanay

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IN THE SUPREME COURT OF KANSAS

APR - 9 2015

HEATHER L. SMITH  
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STATE OF KANSAS *ex rel.* DEREK )  
SCHMIDT, ATTORNEY GENERAL, )  
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Petitioner, )  
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v. )  
 )  
CITY OF WICHITA, KANSAS, )  
A Municipal Corporation, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Original Action No. \_\_\_\_\_

**MOTION FOR A STAY OF DISTRICT COURT PROCEEDINGS**

COMES NOW petitioner, the State of Kansas *ex rel.* Derek Schmidt, Attorney General, and respectfully moves this Court for an order staying district court proceedings in *City of Wichita v. Janice Bradley*, Sedgwick County District Court Case No. 15-CV-0910 (filed April 8, 2015). The City of Wichita's Petition for Declaratory Judgment in that case, which is attached as Exhibit L, asks the district court to determine "if the [Wichita Marijuana Ordinance] is in conflict with state law, whether it is enforceable by the City and whether the same may be properly enacted by the City of Wichita pursuant to its Home Rule Powers." Thus, the City's declaratory judgment action presents many of the same issues as this quo warranto action.

This Court should nonetheless exercise quo warranto jurisdiction over this proceeding. This Court has inherent authority to enter such orders as are necessary to protect its original jurisdiction in quo warranto, see *Chicago, K. & W. Rld. Co. v. Comm'rs of Chase Co.*, 42 Kan. 223, 225, 21 P. 1071 (1889) ("Inherently the Supreme Court must have the power to protect its own jurisdiction, its own process, its own proceedings, its own orders, and its own judgments; and for this purpose it may, when necessary, prohibit or restrain the performance of any act

which might interfere with the proper exercise of its rightful jurisdiction in cases pending before it.”). Exercising that authority to stay the district court action would serve the interests of judicial economy and important public interests in avoiding the further confusion that would result from concurrently litigating these same legal questions of statewide importance in two courts. Allowing district court proceedings to continue in the City of Wichita’s declaratory judgment action would force the State to intervene and file for quo warranto relief in that case, and only delay resolution of the important legal issues presented. The result would be prolonged uncertainty about the validity of the Wichita Marijuana Ordinance to the detriment of the City of Wichita, the State, law enforcement officers, municipal judges, criminal defendants, and the public generally. It is a virtual certainty that this case will end only with a decision from this Court. Thus, a quo warranto action is appropriate and efficient because the legal issues are of statewide importance, and there are no material facts in dispute.

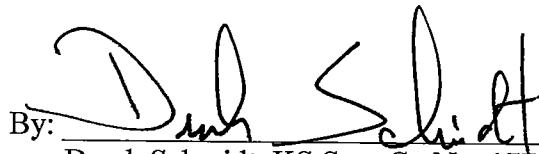
The pending district court action also presents a less efficient means of deciding the legal validity of the Wichita Marijuana Ordinance because the issues presented in the district court are both unnecessarily overinclusive and dissatisfactorily underinclusive in comparison with the State’s quo warranto action in this Court. The district court action is overinclusive because it likely presents ancillary issues, such as whether the proper defendant has been named, that are absent in the State’s Petition. Any time spent litigating ancillary questions would constitute unnecessary delay that could be avoided by staying the district court action and deciding the central legal questions in this Court in the first instance. The district court action also is underinclusive because the Plaintiff in that case raises some, but not all, of the issues presented in the State’s Petition as to why the Wichita Marijuana Ordinance is invalid and should be declared null and void. The City of Wichita’s Petition in the district court does not ask the court

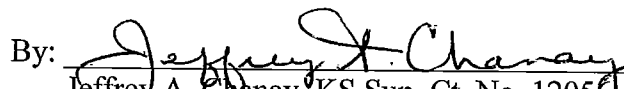
to determine whether the Wichita Marijuana Ordinance is invalid because it was not filed with the city clerk, because it lacks an ordaining clause, or because it is principally administrative in nature. And while the City asks the district court to determine whether the Wichita Marijuana Ordinance conflicts with state law, the City's Petition does not identify any specific conflicts. Thus, it is difficult to determine whether the district court is being asked to consider all of the conflicts identified in the State's Petition in Quo Warranto and Memorandum in Support.

For these reasons, the State of Kansas *ex rel.* Derek Schmidt, Attorney General, respectfully requests that this Court stay the district court proceedings in *City of Wichita v. Janice Bradley*, Sedgwick County District Court Case No. 15-CV-0910.

Respectfully submitted,

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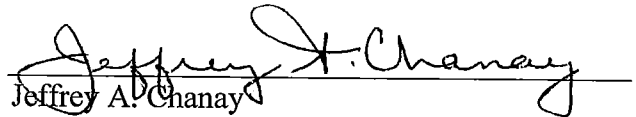
### **CERTIFICATE OF SERVICE**

This is to certify that on this 9<sup>th</sup> day of April, 2015, a copy of the above and foregoing Motion for Stay of District Court Proceedings was served by faxing and mailing the same by depositing it in the United States Mail, first class postage prepaid, addressed to:

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A copy will also be served by hand delivery to the above-identified individuals at the addresses listed on the 10<sup>th</sup> day of April, 2015.

  
Jeffrey A. Chanay